Office Supreme Court, U. S.
FILED
MAR 14 1921
JAMES D. MAHER,
CLERK

Number 29, Original.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1920.

EX PARTE IN THE MATTER OF LINCOLN GAS AND ELECTRIC LIGHT COMPANY,

Petitioner.

PETITIONER'S BRIEF IN SUPPORT OF THE RULE.

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SUBJECT INDEX.

	Page
Statement of the Case	1
Final Decree of September 23, 1915	2
Mandate	4
First Order Complained of	6
Second Order Complained of	8
Summary of orders	12
Petitioner's Contentions	13
Argument:	
1. The mandate involved in this case conferred no jurisdiction on the District Court except to affirm its decree of September 23, 1915, dismissing plaintiff's bill after modifying it so as to hold the occupation tax invalid	14
2. The Court had no jurisdiction to enter the orders because no relief was asked for or prayed against any consumer	18
3. The Court was without jurisdiction to compel your petitioner to make an accounting for alleged overcharges subsequent to September 23, 1915	20
4. The Court was without jurisdiction to enjoin petition from settling with consumers	22
5. The Court was without jurisdiction to restrain persons not parties to the litigation from proceeding in other courts	23
6. The Court was without jurisdiction to require computation of amounts without claim being made by consumers	23
Conclusion	24

TABLE OF CASES CITED.

Page

Arkadelphia Co. v. St. Louis, S. W. Ry. Co., 249 U. S. 134 16

Bellamy v. St. Louis, I. M. & S. Ry. Co., 220 Fed. 876..16, 23

Gaines v. Rugg, 148 U. S. 228..... 14

Grignon's Lessee v. Astor, 43 U. S. 318..... 19

In Re Louisville, 231 U. S. 639.....15, 16, 17

In Re Winn, 213 U. S. 458..... 14

Lincoln Gas & Electric Light Company v. City of Lincoln, 250 U. S. 256..... 3

Lincoln Gas & Electric Light Company v. City of Lincoln, 223 U. S. 349..... 2

Lincoln Gas & Electric Light Company v. City of Lincoln, 253 U. S. 477..... 8

Louisville v. Cumberland Tel. & Tel. Co., 225 U. S. 439..15, 17

McClellan v. Carland, 217 U. S. 268..... 14

St. Louis, Iron Mountain & Southern Ry. Co. v. McKnight, 244 U. S. 368.....16, 20, 21, 22, 23

St. Louis I. M. & S. Ry. Co. v. Bellamy, et. al., 211 Fed. 172 16

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STATEMENT OF THE CASE.

This is an original application for a writ of mandamus against a United States district judge, the application alleging that the judge exceeded the jurisdiction of the court in entering and proceeding to enforce certain orders. These proceedings arise from an action in equity, commenced by the Lincoln Gas and Electric Light Company of Lincoln, Nebraska, on December 27, 1906, in which the plaintiff prayed for a perpetual injunction against the enforcement of two ordinances enacted by the defendant, City of Lincoln.

One of these ordinances limited the rate to be charged by the plaintiff for gas sold in the city of Lincoln; the other levied an occupation tax against the plaintiff. These ordinances were alleged to be in conflict with the Constitution of the United States and the Constitution of Nebraska. Upon the filing of plaintiff's petition in the United States District Court, for the District of Nebraska, Lincoln division, that court entered an order restraining the enforcement of the rate ordinance, until the hearing on the merits. The case was heard on its merits, and the District Court held the rate ordinance valid and the occupation tax ordinance void. Thereupon, the plaintiff appealed to this court.

During the October term, 1911, this court rendered its opinion (*Lincoln Gas and Electric Light Company* v. *City of Lincoln*, 223 U. S. 349), reversing the District Court and requiring further proceedings. Pursuant to the order of this court, the District Court again assumed jurisdiction of the case, appointed a master, who took evidence and rendered a report, holding both the rate and the occupation tax ordinances valid. The cause then came on to be heard before the court with the Honorable Page Morris sitting as judge, upon the exceptions of both parties to the master's report.

After hearing the exceptions, the Court entered the following order:

> "The cause came on to be heard on the 16th day of June, 1915, upon the report of Hon. John J. Sullivan, Special Master, filed herein on the 8th day of September, 1914, and the exceptions of the respective parties to said report and was argued by counsel, and taken under advisement by the Court.
>
> "And now, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz:
>
> "That the report of said Special Master, be and the same is, hereby confirmed:

"That the bill of complaint herein, so far as the same relates to the ordinance of the City of Lincoln, establishing a rate of charges for gas in said city, be and the same is hereby dismissed, and the restraining order heretofore granted against the enforcement of said ordinance is hereby dissolved:

"That the sum of thirty-five hundred dollars ($3500.00) be and the same is hereby fixed and allowed as the compensation of said Special Master for his services and expenses, to be taxed as part of the costs of this action.

"That the plaintiff pay the costs of this action.

"By the court.

"PAGE MORRIS, *Judge.*"

The plaintiff then appealed from the Court's order, and in due course the case was decided in this court, the opinion being rendered at the October term, 1918. The Court there held, (*Lincoln Gas and Electric Light Company* v. *The City of Lincoln, et al.*, 250 U. S. 256):

(Pages 268-9): "The final decree of September 23, 1915, will be modified by embodying in it a reiteration of that part of the final decree of April 6, 1909, which held that the ordinance of the City of Lincoln, approved December 10, 1906, levying an occupation tax against complainant, was illegal and void because violative of the Constitution of the State of Nebraska, and that the enforcement of the same as to complainant should be perpetually enjoined.

"The decree of September 23, 1915, will be further modified so that the dismissal of the bill of complaint, in so far as it relates to the ordinance of the City of Lincoln approved November 19, 1906, establishing a rate for gas in said city, shall be without prejudice to the commencement of a new action to restrain the enforcement of said ordinance hereafter, and

"Decree, as thus modified, affirmed with costs."

In due course the mandate of this Court was filed in the District Court, the mandate being as follows:

"Whereas lately in the District Court of the U. S. for the District of Nebraska, before you or some of you, in a cause between the Lincoln Gas and Electric Light Company, complainant, and the City of Lincoln, et al., defendants, wherein the decree of the said District Court entered in said cause on the 23d day of September, A. D. 1915, is in the following words, viz:

"This cause came on to be heard on the 16th day of June, 1915, upon the report of Hon. John J. Sullivan, special master, filed herein on the 8th day of September, 1915, and the exceptions of the respective parties to said report and was argued by counsel, and taken under advisement by the court.

"And now, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz:

"That the report of said special master, be and the same is, hereby confirmed:

"That the bill of complaint herein, so far as the same relates to the ordinance of the city of Lincoln, establishing a rate of charges for gas in said city, be, and the same is hereby dismissed, and the restraining order heretofore granted against the enforcement of said ordinance is hereby dissolved;

"That the sum of thirty-five hundred dollars $3500.00) be, and the same is hereby fixed and allowed as compensation of said special master for his services and expenses to be taxed as part of the costs of this action.

"That the plaintiff pay the costs of this action.

"By the Court:

"PAGE MORRIS,
"Judge.

"And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and eighteen, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel.

"Consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of

the said District Court in this cause be and the same is hereby modified as indicated in the opinion of this court, and as so modified be, and the same is hereby, affirmed with costs; and that the said defendants, the City of Lincoln, et al., recover against the said complainant twenty dollars for their costs herein expended and have execution thereof.

June 2, 1919.

"You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

"Witness the Honorable Edward D. White, Chief Justice of the United States, the twentieth day of December, in the year of our Lord one thousand nine hundred and nineteen.

"JAMES D. MAHER,
"Clerk of the Supreme Court,
of the United States.

Cost of defendants:	Paid.
Clerk	
Printing record	$.....
Attorney	20.00
	20.00"

Upon the filing of the mandate, the respondent, the Honorable Martin J. Wade, sitting as judge of the District Court, in accordance with the terms thereof, entered the following order:

"This cause came on for hearing upon the motion for judgment on the mandate of the Supreme Court of the United States herein, dated December 20, 1919, and filed in this court December 24, 1919; upon due consideration whereof it is ordered, adudged, and decreed:

"1. That the decree of September 23, 1915, be, and the same hereby is modified by adding thereto the following:

"The court further finds that the ordinance of the City of Lincoln, approved December 10, 1905, levying an occupation tax against the complainant, violates the constitution of the State of Nebraska, and is for that reason illegal and void and that the enforcement of the same as to complainant should be and is hereby perpetually enjoined.

"2. That the decree of September 23, 1915, be further modified by adding after the words 'is hereby dissolved' the following 'without prejudice to the commencement of a new action to restrain the enforcement of said ordinance as provided in the opinion of the Supreme Court of the United States herein.'

"MARTIN J. WADE.

"January 6, 1920."

On the same day the respondent entered another order, which is one of the orders now complained of, as follows:

"Now, to-wit, on this sixth day of January, 1920, upon the entry of decree upon the mandate of the Supreme Court of the United States herein, the defendants present their motion for an order retaining jurisdiction in this Court of this case for the purpose of making restitution of overcharges under the conditions of the bond filed herein. The plaintiff objects to such application, which objections are on file. The motion and objections thereto having been argued and submitted and the court being now fully advised, finds that the objections to said motion should be, and the same are, hereby overruled. The plaintiff excepts.

"And now, therefore, it is ordered and adjudged that under the general equity powers of the Court and under the expressed terms of the bond filed in this case, the court has jurisdiction to make all orders and decrees found to be necessary in making refund and restitution to consumers of gas for all amounts collected over and above the legal rate pending the litigation herein, to which ruling the plaintiff excepts.

"And thereupon the question is presented under said motion and the objections thereto, as to whether the consumers of gas are entitled to receive interest upon the

amount of overcharges paid by them, and the court being now fully advised, finds and it is adjudged that the consumers of gas shall be paid by the plaintiff the overcharges, together with the legal rate of interest thereon from the time such overcharges were paid to the date of payment, to which the plaintiff excepts.

"And thereupon under said motion and objections, there is argued and presented the claim of the plaintiff that in making repayment and restitution, the plaintiff shall have the right to have determined what amount would in fact be legal, just, and non-confiscatory rate during the period when the overcharges were paid and that plaintiff shall have the right to have an accounting and adjustment and that the amount, if any, of overcharges to be repaid, shall be only the difference between the amount paid and the amount which the court might determine would be legal, just, and non-confiscatory rate.

"And now upon said question, the court being fully advised, finds that the plaintiff is not entitled to the relief asked, but that under the law and under the specific terms of the bond, the consumers are entitled to receive the difference between the ordinance rate and the amount actually paid without deduction, together with interest. To this ruling the plaintiff excepts.

"And now with reference to repayment and restitution it is ordered that this court alone shall have jurisdiction to determine all matters between the consumers and the Lincoln Gas and Electric Light Company, and it is now ordered and adjudged that all persons, their agents, employees, or assignees shall be, and they are hereby, restrained from proceeding in any other court except this court, to enforce or have adjusted the matter of overcharges or the repayment thereof. And it is further ordered that the plaintiff shall not pay the claim of any person claiming to be an assignee of any consumer until the same has been presented to this court and fully considered and approved.

"And now further with reference to restitution and repayment, it is ordered that the plaintiff shall proceed with all practical expedition to make repayment to all

consumers as herein determined and in accordance with the findings of the court herein. At the end of sixty days the plaintiff shall file report as to progress in repayment.

"During said period of sixty days any person having any claim or controversy not settled or disposed of, by agreement of the parties, may file the same with the clerk of this court, and at the expiration of said sixty days, the court will determine whether or not it is necessary to appoint a master for the consideration of controverted questions.

"The court retains jurisdiction to make further orders herein at any time and the case is continued for such further orders.

"MARTIN J. WADE.
"Judge."

Your petitioner contended that the order was without jurisdiction and erroneous and therefore appealed to this Court, but the appeal was dismissed for want of jurisdiction for the reason that the order referred to was not a final order (*Lincoln Gas and Electric Light Company* v. *City of Lincoln, et. al.*, 253 U. S. 477).

Thereupon the respondent herein entered another order, also now complained of by your petitioner, which order is as follows:

"And now on this 14th day of October, 1920, in the above case it is,

"Ordered and adjudged that Ralph P. Wilson be, and he is hereby, appointed special master herein, with full power to make investigation and determine all matters in controversy and make a report to this court.

"He shall proceed forthwith to examine the books and accounts of the Gas and Electric Company and he shall, from such books and accounts, prepare a report upon each individual account of a consumer of gas who

has paid any amount in excess of the ordinance rates during the pendency of any restraining order of injunction herein, showing the total amount paid, the amount due to the consumer for overcharges or charges in excess of the ordinance rate, as heretofor determined in this case, and interest upon such excess payments computed at the legal rate of seven per cent per annum.

"The individual cases will be included in a report to this court, but in order that the process of adjustment may be expedited, the master will file a report as soon as he has determined approximately one-fourth of the claims. Three additional reports will be filed, each including approximately one-fourth of the claims. This will simplify examination of the accounts. It is ordered that the master shall set forth the claims as nearly as practicable, in alphabetical order. As soon as the first report is filed, the court will make further orders as to notices and time for filing objections and for further proceedings.

"The four reports, aforesaid, will include the claims where nothing has been paid. An additional report will include the claims where payments, or partial payments, have been made, and in order that such report may be made, it is now,

"Ordered and adjudged, that all persons who have received payment or partial payment, and who still claim a balance on account of interest or for any other reason, shall file his claim with the master within sixty days from this date, such claim stating the amount received, and the amount still claimed to be due. It will not be necessary to compute the amount of interest in filing a claim. It will be sufficient to specify in the claim the amount received by the consumer and make a general claim for interest thereon, and the computation may be hereafter made in case the court holds liability. The master will prepare a printed form for the use of claimants, who can fill in the amount paid and make a general claim for anything still claimed to be due, which the consumer can use in the filing of claims. It will not be essential that such printed forms be used, but it will

simplify the procedure if such claims are uniform. The master will fix a time for hearing before him of the claims, and parties will be notified and evidence will be taken and the master will make his findings of facts, and of law, and report the same to this court.

"The testimony upon such hearings shall be taken in shorthand and preserved, but to save expense, it is ordered that the master shall not have transcript made or report the evidence taken in any individual case, except upon further order herein.

"The master will understand that in the preparation of report for claims, the computation shall be made for the different periods during which excess rates were paid, there being a portion of the period during which the court is advised the ordinance rates only were charged. Parties will understand that the only claims necessary to be filed with the master are those in cases where partial payment has been made by the Gas and Electric Light Company and where interest is now claimed upon the amount so paid or where it is claimed that the amount so paid was not correct for the period covered by such payment. It may be that in many cases a party will have a right to refund of excess charges for a period not covered by any payment by the company. Such a claim will be reported by the master without having any claim filed before him. The same party may have a claim for interest upon partial payment for which a claim must be filed.

"Persons who have heretofore filed claims with the clerk of this court need not file another claim for the same matter in controversy with the master, it being hereby ordered that all claims filed with the clerk of this court shall be turned over to the master, who shall proceed with them as herein directed, with reference to claims filed direct with him by the claimant. The master shall have power to direct any claimant to make his claim more specific and as to all claims, shall have full jurisdiction to require issues to be made and to do all other things which will enable him to simplify the hearings as much as possible.

"It will not be necessary for the master to compute the interest upon these disputed claims where partial payment has been made until further order by the Court. It will be sufficient in reporting his conclusions of fact and law to state that he holds that the company is not liable for interest, as he may find, leaving the computation for later order, in case it is held that there is liability therefor.

"The master may, at any time, ask for further directions in regard to the performance of his duties.

"In computing interest upon all claims, in order that the same may be uniform, computation shall be made upon the respective payments to October 1, 1920. Computations for interest from that date until the time of payment may be made at the time of such payment.

"There is a contention that repayment of overcharges is not required after a certain date in 1915. Therefore it may be necessary for the master to make separate computation of the claims accruing up to such date and claims accruing after such date. Such date shall be determined from the record and the claims of counsel filed herein, the purpose being to have the report of the master in such form that the questions raised as to liability after such date may be presented and determined by the court.

"The master is hereby authorized to employ accountants and other assistants; to employ a stenographer; to issue subpoenas for witnesses and for the production of witnesses and production of books and papers by fine or commitment with the same power as would the court if sitting in such hearing.

"The master will proceed with expedition, to the end that final disposition of this case may be made as soon as possible, employing as many accountants as can work to advantage in the preparation of the accounts for reporting, as aforesaid.

"Any money necessary to be advanced, shall be paid, half by each of the parties to this case, and the master

will have the power to make and impose orders for such payments.

"Plaintiff excepts to the appointment of a master and to all other orders herein.

"MARTIN J. WADE.
"Judge."

The two orders entered after the modification of the decree of September 23, 1915, are complained of in the instant case. A summary of the first order follows:

1. By the order the court assumed jurisdiction of the case for the purpose of making restitution of overcharges.

2. The court assumed jurisdiction as expressed in the order, not from the terms of the mandate nor by the provisions of any prior order of that court, but "under the general equity powers of the court and under the expressed terms of the bond filed in this case."

3. The court in effect entered a judgment against the Company in favor of unnamed and unknown "consumers of gas" for unascertained "overcharges" with interest.

4. The court held that it alone had jurisdiction "to determine all matters between the consumers and the Lincoln Gas and Electric Light Company," as to repayment of overcharges.

5. The court enjoined all persons from proceeding "to any other court to enforce or adjust any matter relating to overcharges.

6. The court enjoined your petitioner from paying any claim of any assignee of any consumer without the approval of the court.

The second order complained of may be summarized as follows:

1. A master was appointed with full powers of a master in chancery.

2. He was required to prepare, from the books of the Company, an account showing all gas consumers from 1906 to 1921, and all amounts due consumers for overcharges.

3. The court required consumers who had received partial payments on account of overcharge to file claims without specifying the amount of their claim.

4. The court ordered that it would be unnecessary for any consumers to file any claim except a consumer who had received a partial payment.

5. The court required the master to compute alleged overcharges from September 23, 1915 to 1921.

6. The court authorized and directed the master to employ accountants, bookkeepers and clerks and to draw upon your petitioner for one-half of the expense incident thereto.

CONTENTIONS OF PETITIONER.

We assume there will be no controversy concerning the power of this Court to mandamus a District Court to vacate orders entered without jurisdiction. The question then is whether or not the District Court had jurisdiction to make the orders complained of. Other errors will not be considered.

The petitioner contends that the court was without such jurisdiction for the following reasons:

1. Because the terms of the mandate gave the District Court no jurisdiction to take any action except to affirm its decree of September 23, 1915, dismissing plaintiff's bill, after modifying the decree so as to hold invalid the occupation tax ordinance.

2. The court had no jurisdiction to enter the orders because no relief was asked for nor prayed against any consumer.

3. The court was without jurisdiction to compel the expenditure of large sums of money by your petitioner

to ascertain alleged overcharges due after September 23, 1915, since the litigation in that court was concluded as of that date.

4. The court was without jurisdiction to impair petitioner's freedom of contract by prohibiting settlements or payments to consumers or assignees except upon approval by the court.

5. The court was without jurisdiction to restrain persons, not parties to the litigation, from proceeding in other courts.

6. The court was without jurisdiction to require your petitioner to pay for the expenses of computing amounts which might be due to its consumers, without any claims being made on behalf of such consumers, because such procedure places the burden of proof upon your petitioner to disprove claims instead of placing the burden upon the claimants as is required by the practice and usage of all courts of the United States.

POINT ONE.

The mandate involved in this case conferred no jurisdiction on the District Court except to affirm its decree of September 23, 1915, dismissing plaintiff's bill after modifying it so as to hold the occupation tax invalid.

It is well settled that after an appeal the trial court has jurisdiction only to proceed in conformance with the direction of the mandate of the appellate court. If discretion as to further proceedings is permitted by the mandate then, of course, the trial court has power to proceed in accordance with the terms of its mandate. When, however, the mandate does not vest discretion in the trial court, but directs particular proceedings, then the trial court has only jurisdiction to follow such direction.

Gaines v. *Rugg*, 148 U. S. 228.
In Re Winn, 213 U. S. 458.
McClellan v. *Carland*, 217 U. S. 268.

There then remains for consideration, as one of the points involved, the question as to whether or not the mandate vested discretion for further proceedings in the District Court.

It appears clearly from the decisions of this court, that the question as to whether or not discretion for further proceedings is vested by the terms of a mandate, rests upon two propositions, which we will state thus: for a mandate to confer authority on a trial court to take discretionary steps it must appear, first, that in the final decree of the court from which the appeal was taken, reservation of jurisdiction for future contingencies was expressly made by the court, and second, that the mandate following the final decree states that the cause is remanded for "further proceedings."

We respectfully call the attention of the court to *In Re Louisville*, 231 U. S. 639. This was an original action involving a rule on a District Judge to show cause why mandamus should not issue. The mandamus action arose out of the case of *Louisville* v. *Cumberland Tel. & Tel. Co.*, 225 U. S. 430. In that case the trial court held the ordinances void and of course under such decision there would be no necessity of a reservation for future contingencies. The second proposition urged, however, i. e., that a mandate confers no jurisdiction unless it provides for "further proceedings" is clearly decided. The mandate in the Louisville case contained the following provision (*In Re Louisville*, 231 U. S. 639-544):

> "And it is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of Kentucky for *further* proceedings not inconsistent with the opinion of this court."

This court held that proceedings by the trial court, not expressly directed in the mandate were within its discretion, because "the terms of the mandate permit further proceedings * * *" (Idem. page 645).

We likewise call the attention of the court to the series of cases, concerning the same subject, commenced in the District Court for the Eastern District of Arkansas, in 1914. The original case was *St. Louis I. M. & S. Ry. Co.* v. *Bellamy, et al.*, 211 Fed. 172. This case was considered by the Circuit Court of Appeals for the Eighth Circuit (*Bellamy* v. *St. Louis, I. M. & S. Ry. Co.*, 220 Fed. 876). The case was finally decided by this court on appeal from the Circuit Court of Appeals (*St. Louis, I. M. & S. Ry. Co.* v. *McKnight*, 244 U. S. 368). A branch of the same litigation was again considered by this court in *Arkadelphia Co.* v. *St. Louis, S. W. Ry. Co.*, 249 U. S. 134. In this litigation a mandate of this court was construed. The real grounds for the final determination of the court are not easily observable until the last announcement of the court is reached in the Arkadelphia case. In the McKnight case (244 U. S. 368) at page 373, the court said: "It may be doubted whether, in view of the mandate, there was any power in the District Court to order reference to the master to determine the liability on the bonds." In that case, the court, in a foot note to the opinion (p. 373) points out the distinction between the McKnight case and the Louisville case (231 U. S. 639-645-652), in that while the Louisville mandate requires "further proceedings" the McKnight mandate apparently contained no such provision. However, when the same mandate came before the court again in the Arkadelphia case, the attention of the court was then called to the fact that the mandate actually contained a provision authorizing "further proceedings." Therefore, the court in the Arkadelphia case, while not disagreeing in any particular with its holdings in the McKnight case, announced as follows (249 U. S. 139):

> "In *St. Louis, Iron Mountain & Southern Ry Co.* v. *McKnight*, 244 U. S. 368, 373, doubt was expressed whether, in view of the form of the mandate, there was any power in the district court to determine the liability of the railway companies upon the bonds. But at that time our attention was not called to the fact that the

mandates contained a provision authorizing further proceedings; a provision that removes all question of the power of the District Court. *In Re Louisville*, 231 U. S. 639, 645; *Louisville* v. *Cumberland Telephone Co.*, 231 U. S. 652)..

Again when the Arkadelphia case was decided, the other proposition (as to reservation for future jurisdiction) contended for in this brief, was considered, and it was discovered that the decree appealed from contained the following provision (249 U. S. 143):

> "And the court reserves and retains unto itself jurisdiction of the subject matter of this suit and of all parties hereto, to the end that such other and further orders and decrees may be made herein as may become necessary by reason of any changed conditions as to the facts, equities or rights that may hereafter take place or arise."

In considering this, the court held (p. 144):

> "For irrespective of this, those clauses of the final decrees by which the District Court retained jurisdiction for the purpose of making such further orders and decrees as might become necessary, coupled with the subsequent mandates of this court permitting further proceedings to be taken in conformity with our opinion and decrees and according to right and justice, empowered the District Court to set aside so much of its final decrees as released the railways and their sureties from liabilities theretofore incurred under the injunction bonds. This is what the District Court in effect did when it ordered the reference and sustained the claims of the oil company so far as they accrued prior to the final decrees."

It is evident that the Arkadelphia case settles the question under discussion. Jurisdiction in a trial court to adopt discretionary procedure, depends, first upon a reservation in the final decree for further jurisdiction, and second upon an authorization in the mandate for "further proceedings."

An examination of the decree and the mandate in the instant case discloses that neither of the above elements is

present. The decree, which is set out in full on page 4 of this brief, merely dissolves the restraining order and dismisses the plaintiff's bill. It does not reserve jurisdiction for any accounting, nor does it adopt any language from which such intention could be drawn.

Likewise the mandate distinctly fails to provide for "further proceedings". The exact language of the mandate is as follows:

> "You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

In the Louisville cases, and in the Arkadelphia case, the mandate provided for "further proceedings". When the language of the mandate in the instant case does not refer to or suggest further proceedings, and when the language in other mandates, which have been construed to vest discretion, contain the words absent from this mandate, the limitation upon the trial court would seem to be clearly fixed. It is petitioner's respectful contention that because the final decree of September 23, 1915, did not attempt to reserve jurisdiction for future contingencies, and because the mandate was not of the class which permits further proceedings; that there was nothing for the District Court to do under the mandate except to modify the decree in the specific respects ordered by the mandate, and then dismiss plaintiff's bill, thus ending the litigation. Obviously, if the litigation did end when the modifications required were made, then both orders complained of were entirely without jurisdiction.

POINT TWO.

The Court had no jurisdiction to enter the orders because no relief was asked for or prayed against any consumer.

Jurisdiction of a court means the power of the court to hear and determine the case and to decide what shall be

done or adjudged between the parties. *Grignon's Lessee* v. *Astor*, 43 U. S. 318. It must then necessarily follow that unless the court can, by its order, bind all parties to a performance of a decree, jurisdiction is lacking.

A decree cannot bind a person not a party to the record nor in privity with parties to the record. Bearing these matters in mind, it is seen that no consumer was in anyway connected with this case when the orders complained of were made. It is true that if the final decree and mandate conferred jurisdiction for further proceedings upon the trial court, then under the general equity power of the court often announced it would make orders for the relief of any person praying therefor, who was either an original party to the suit or who became a party so that the decree would bind him. It will thus be seen that the consumers surely cannot secure an adjudication of their rights in the case at bar without becoming parties thereto. Otherwise the construction of the term "jurisdiction" would result in a situation in which your petitioner is bound and the consumer is not. For instance, if the orders are valid the master reports that John Jones is entitled to $38.00 and John Smith is entitled to $45.00. The Company, under the orders, pays these two sums into court. Jones accepts his money, which, of course, estops him from thereafter claiming he was not bound by the decree. Smith, on the other hand, contends that he is entitled to $90.00, brings suit in a court having jurisdiction and recovers that amount. The Company in that instance has been subjected to an enormous expense and Smith has been permitted to withhold his decision as to his acceptance of a judicial decree, and has ultimately required double payment by the company. This not only might happen, but has happened, in as much as the state courts of Nebraska have in concrete cases decided that consumers have the right to bring suits and enforce judgments against the Company, notwithstanding these orders.

The principle contended for is clearly announced in the Arkadelphia case. There the court said that the Railroad Company's position in claiming that the consumer came in by intervention, and not as a party to the original case, was unsound, because no matter how he got in, he was in. In this case, however, there is no consumer in the case nor is there any provision in these orders by which consumers, to receive benefits from the case must become parties thereto. The orders require the company to compute amounts owing to a large number of persons and to pay the money into court with absolutely no provision by which the consumer is required to accept the judgment of the court as to the correctness of the amount. A decree binding upon one party, but not binding upon his adversary must necessarily fail for want of jurisdiction.

As was said in *St. Louis I. Mt. & So. Ry. Co.* v. *McKnight*, 244 U. S. 368, page 375:

> "Although the injunctions enjoined all shippers and travelers, and therefore him, from instituting suits on account of alleged overcharges, Gallup did not in fact become a party to the suit in the District Court; and he could not, after the mandate directed dismissal of the bill, be compelled to submit to that court the adjudication of his claim."

POINT THREE.

The Court was without jurisdiction to compel your petitioner to make an accounting for alleged overcharges subsequent to September 23, 1915.

It is the privilege of a person affected by an unconstitutional legislative act to obey it or disregard it. If the penalties are so enormous that it would endanger his liberty or confiscate his property to take his chance as to its unconstitutionality, after he is put in jeopardy, he may then enter an equity court and ask for a determination of the constitu-

tional question. However, there is no rule which requires such procedure. The ordinance involved in this case was attacked in the method outlined and was held valid up to the 23rd day of September, 1915.

This ordinance might have been non-confiscatory for one period and confiscatory for another. This point is clearly illustrated by the facts in the case, of which the court will take judicial notice. Shortly after the ordinance was adjudicated valid, the world war commenced and such economic disturbances resulted that the value of materials and labor rapidly rose and correspondingly the purchasing power of the dollar fell. This ordinance, valid in 1913, may have been invalid in 1915. If it was invalid as being confiscatory, then a consumer bringing an action for overcharges during 1915, or thereafter must meet the defense that the ordinance upon which he must base his claim was invalid in 1915, and thereafter. There surely can be no question but that the Company would be entitled, at least, to a hearing on this question. These orders allow no hearing, but merely require the Company to compute the amounts and to pay them into court, respecting a period during which no consumer claims any rights and during which there is no adjudication as to the validity of the ordinance. On the other hand, there is a strong intimation in the decision of the court in the Lincoln rate case that with mounting costs, occasioned by the world war, the ordinance was invalid.

This view has been taken by this court in *St. Louis I. Mt. & S. Ry. Co.* v. *McKnight*, 244 U. S. 368. Here the court said (page 374):

> "Damages arising between May 11, 1911, the date of the decree granting the permanent injunction, and July 18, 1913 (the date of the decree on mandate dismissing the bill) were not recoverable on the injunction bond. *Houghton* v. *Meyer*, 208 U. S. 149. If the remedy of shippers and carrier were limited to proceedings on the bond,

they would be denied all recovery for overcharges after May 11, 1911. Furthermore, the decree of May 11, 1911, expressly released the Railway Company and sureties from further liability on the bonds. In so far as the order referred to the master 'under rule 15' the determination also of damages 'alleged to have been sustained by reason of the granting' of the permanent injunction, it was clearly erroneous and affords no justification for enjoining suit in a state court to recover for overcharges made after the final decree."

POINT FOUR.

The Court was without jurisdiction to enjoin petitioner from settling with consumers.

We respectfully contend that no court of equity has the power to prevent the making of a contract or a compromise of controversies between parties when no question of the right of third persons or public policy intervenes. Here any right of any consumer is separate and distinct from the right of every other consumer. There is no community of interest between all of the consumers or any of them and the Company (*St. Louis, I. Mt. & So. Ry. Co.* v. *McKnight*, 244 U. S. 368-375). How, then, could the court have jurisdiction to prevent the Company from making such settlements or adjustments as might be desired by the Company and any particular consumer? The right to overcharges rests individually with each consumer, his heirs or assigns. If he desires to accept a compromise from the Company or if the Company desires to pay him his full demand, no court has jurisdiction to restrain either the consumer or the company, and particularly is this evident when it is recalled that the consumer enjoined is not a party to the litigation. When it is easily recognized by the consumer that the injunction is invalid and when the state courts so hold, then the situation immediately arises in which the consumer procures a judgment in some other court, which he is able to enforce by process, and which your petitioner cannot pay without being in contempt of court.

POINT FIVE.

The Court was without jurisdiction to restrain persons not parties to the litigation from proceeding in other courts.

This precise question was decided in *Bellamy* v. *St. Louis, I. M. & S. Ry. Co.*, 220 Fed. 876, and affirmed by this court in *St. Louis, I. Mt. & So. Ry. Co.* v. *McKnight*, 244 U. S. 368. A statement of the proposition is enough to indicate that the court's order was without jurisdiction.

POINT SIX.

The Court was without jurisdiction to require computation of amounts without claim being made by consumers.

Due process of law requires a contention in a court or body of competent jurisdiction, an issue and judicial decision. The orders require the master to estimate how much the petitioner owes 25,000 different consumers and without requiring any one of them to establish his claim, forces the petitioner to pay the money into court. The petitioner is deprived of the inherent right given it by all English methods of jurisprudence to require the claimant to prove his case. Under the procedure outlined in the orders, the petitioner is shorn of all defense before the litigation starts. It is not only announced in advance that the defenses it might make are worthless, but it is further announced in the order that the Company will not even be allowed to present them. Assume that the Company's books show Will Smith overcharged under the ordinance $50.00. In compliance with the orders the Company pays the $50.00 into court for the benefit of said Smith. Smith, it happens, owes the Company $90.00 on an account, but inasmuch as the Company is not allowed to make a defense or set up a counter-claim, or do anything except pay the money into court, it is absolutely precluded from the right of set-off given to it by the Nebraska statutes. It may happen that Smith, a consumer in 1910, has left Lincoln, and his whereabouts are unknown. The Company has paid the

$50.00 into court, and surely cannot get it back. Any system which requires a defendant to pay money into court prior to a hearing as to whether or not he owes it, deprives him of his inherent rights under any legal procedure, unless, as we have said, either public policy or the rights of third persons intervene, which elements are not present in this case. But in any event a procedure which requires the payment of money before a hearing, and then provides no method by which the injured party may secure a return of the money at any future time, if it should appear that the payment was illegally required, is surely violative of all just legal principles.

CONCLUSION.

We contend that the trial court, having failed to reserve further jurisdiction in the decree, when confronted with a mandate directing particular acts and not authorizing further proceedings, had no discretion whatever except to comply with the mandate. We contend that the orders were without jurisdiction because they were so framed as to bind the Company, while not binding upon the person for whose benefit they were made. We contend that the court had no jurisdiction to require hypothetical or moot computations at large expense to determine overcharges alleged to be due subsequent to September 23, 1915, since the subject of litigation was concluded at that time. We contend that the orders were without jurisdiction because they prohibited petitioner's freedom of contract, because they restrain persons not parties to the litigation from proceeding in other courts, and because they require your petitioner to disprove that it is owing large sums of money.

Respectfully submitted,

ROBERT A. BROWN, of St. Joseph, Mo.

MAXWELL V. BEGHTOL, of Lincoln, Neb.

Attorneys for Petitioner.

CHARLES A. FRUEAUFF, of New York City,

Of Counsel.

FILED
MAR 14 1921
JAMES D. MAHER,
CLERK

Number 29, Original.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1920.

EX PARTE IN THE MATTER OF LINCOLN GAS AND ELECTRIC LIGHT COMPANY,

Petitioner.

PETITIONER'S ADDITIONAL BRIEF IN SUPPORT OF THE RULE.

ROBERT A. BROWN,
MAXWELL V. BEGHTOL,
Attorneys for Petitioner.

CHARLES A. FRUEAUFF,
Of Counsel.

WEKESSER COMPANY, Law Briefs, Lincoln, Neb.

Number 29, Original.

IN THE

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October Term, 1920.

EX PARTE IN THE MATTER OF LINCOLN GAS AND ELECTRIC LIGHT COMPANY,

Petitioner.

PETITIONER'S ADDITIONAL BRIEF IN SUPPORT OF THE RULE.

May It Please the Court: Since examining the return, it occurs to petitioner that a discussion of one point raised by the respondent might assist the court.

As we understand the return it seeks to justify the orders by a claim that a supersedeas bond, filed in the cause on November 22, 1915, in some manner reserved jurisdiction in the trial court for further proceedings. This bond was filed pursuant to an order of Judge Morris, dated November 22, 1915. Copies of the order and bond are found on page 95 in the printed record, *Lincoln Gas and Electric Light Company* v. *City of Lincoln, et al.*, October term, 1917, Number 300, the order being as follows:

ORDER OF COURT ON PLAINTIFF'S APPLICATION FOR ALLOWANCE ON APPEAL.

Filed in United States District Court, District of Nebraska, Lincoln Division, November 22, 1915.

"This cause having come on for hearing before me, one of the judges of the District Court of the United States for the District of Minnesota sitting in this case by special assignment, at Minneapolis, Minnesota, within said district, on the plaintiff's petition for the allowance of an appeal:

"It is hereby ordered that the petition of the plaintiff be granted and the appeal therein prayed be allowed and that a duly authenticated transcript of the record proceedings and papers upon which said decree is based be sent to the Supreme Court of the United States.

"It is further ordered that the injunction in this case be restored and held in effect during the pendency of this appeal upon the plaintiff filing bond duly approved in the sum of five hundred seventy-five thousand ($575,000) dollars conditioned as required by law and that the same act as a supersedeas and also to keep said injunction in effect and as a bond for costs and damages on appeal.

"PAGE MORRIS, Judge.

"Dated November 22, 1915."

Pursuant to this order, the bond was filed. It is as follows:

SUPERSEDEAS BOND.

Filed in United States District Court, District of Nebraska, Lincoln Division, November 22, 1915.

"Know all men by these presents: That the Lincoln Gas & Electric Light Company, a corporation, under the laws of the State of Nebraska, the complainant herein as principal, and National Surety Company, a corporation, under the laws of the State of New York, as surety, are held and firmly bound unto the Clerk of the District Court of the United States, for the District of Nebraska, in the penal sum of five hundred and seventy-five thou-

sand dollars ($575,000) lawful money of the United States, to be paid to the said clerk, and his successors in office, for the benefit of all gas consumers, who have been patrons of, and who have purchased gas from the said complainant, during the pendency of the above entitled action, from the commencement thereof, and for all gas consumers, who shall purchase gas of the said complainant, or its successors hereafter, at any time before the final determination of said suit, and for the benefit of all whom it may concern, including the defendants herein, for which payment well and truly to be made the said principal and surety hereby bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

"Sealed with our seals and duly signed and executed by us this 19th day of November, A. D. 1915.

"Whereas, by virtue of an order and decree entered herein on the 23rd day of September, 1915, the temporary injunction heretofore granted in said cause, restraining the defendants from putting into effect and enforcing an ordinance known as Ordinance Number 432 of the City of Lincoln, Nebraska, regulating the price of manufactured gas and fixing the price for all manufactured gas sold within said city, at one dollar ($1.00) per one thousand cubic feet thereof, and providing that any gas company may add a penalty of not more than ten cents per one thousand cubic feet of gas sold, for non-payment after six days from the date such gas company has furnished a bill or statement to any consumer, and providing for a minimum monthly charge of twenty-five cents for a single gas service, was by said court dissolved; and

"Whereas, the above named Lincoln Gas & Electric Light Company has obtained an appeal to the Supreme Court of the United States, to reverse the judgment of said District Court, in said cause:

"Now, therefore, the condition of this obligation is such that if the said Lincoln Gas & Electric Light Company shall prosecute its appeal to effect, or failing to make its appeal good, if it shall answer all costs and

damages and refund for all over-charges, collected from gas consumers, above the price fixed by said ordinance and shall pay to the clerk of this court, or his successor in office, for the benefit of all whom it may concern, and in particular for the benefit of all gas consumers entitled to refunds, all overcharges collected from such gas consumers since the granting of the original injunction in this suit, above the price for gas fixed by said ordinance, together with interest thereon, when the several parties lawfully entitled thereto and the amount of the refund due each as aforesaid shall have been ascertained in this action in such manner as the court shall direct, and when so ascertained, the determination to be binding upon all parties to this bond, then and when all the conditions of this bond shall have been complied with, this obligation shall be void, otherwise to be and remain in full force and effect.

LINCOLN GAS & ELECTRIC LIGHT COMPANY.
By FRANK W. FRUEAUFF, President.

Attest:
J. J. McWHINNEY,
Ass't. Secretary.
(Corporate Seal.)

NATIONAL SURETY COMPANY,
By W. S. McCURDY,
Its Attorney-in-Fact.

L. R. GREENE,
E. W. O'TOLLE,
As to Surety.

It will be noted that the order for the bond was not made in connection with the final decree entered on the 23rd day of September, 1915, and that the order requiring the bond as a condition for appeal does not refer to nor modify the final decree in any particular.

As petitioner contended, in its original brief, there are two elements which must be present before it may be said that a trial court is reinvested with discretionary jurisdiction of a cause, after jurisdiction has been once lost by appeal. These

two necessary elements are: first, the reservation in the final decree of jurisdiction for future contingencies; and, second, permission by the terms of the mandate for "further proceedings." It is therefore apparent, if petitioner's analysis of the situation seems persuasive to the court, that respondent's construction of the effect of this bond would result in complying with but one of the two necessary features required. In other words, even though the trial court did reserve jurisdiction in the final decree for future contingencies, such reservation in itself is not sufficient to reinvest the trial court with jurisdiction after an appeal, unless in addition it appears that the mandate from the appellate court provides for "further proceedings". So that even if it is correct, as respondent contends, that the supersedeas bond above referred to, was really intended to operate as a reservation of jurisdiction, still there is lacking the vital and jurisdictional permission for "further proceedings" in the mandate.

Petitioner must, however, with due respect, disagree with respondent as to the legal effect of the supersedeas bond. In considering its effect we must not confuse the question of the liability of petitioner or petitioner's surety on the bond, with the question of the court's jurisdiction to make the orders complained of in the instant case. This case does not present, even remotely, the question of the liability of the surety. The surety has never been a party to any of the litigation. The laws of Nebraska do not permit a summary judgment against a surety upon affirmance of a judgment (*Dunn* v. *Bozarth*, 64 Neb. 862). The surety's liability cannot be determined except by appropriate proceedings in some court with jurisdiction of the subject matter, and the person of the surety.

The question here is not one as to whether or not either your petitioner or the surety on its bond can be required to pay by lawful proceedings overcharges alleged to be due, but it is whether or not the filing of this bond modified or affected

the final decree of September 23, 1915. It would seem to be evident, without more than a statement of the proposition, that the filing of a bond, preparatory to appeal from a final order, can neither enlarge nor restrict the order itself. (*Owens Co.* v. *Officer,* 244 Fed. 47). The decree of September 23, 1915, contains no reservation of jurisdiction whatever. It is now said that because sixty days later your petitioner filed a supersedeas bond, in which the principal and surety agreed to stand good for the payment of overcharges, the final decree was thereby intended to reserve jurisdiction for future contingencies. It is submitted that your petitioner could no more enlarge the order of the court, by its own act, than it could restrict the order of the court, by its own act. There is no principle of estoppel present, in as much as the bond was not voluntarily given, but was a condition exacted by the court before the appeal would be allowed.

Petitioner's position is strengthened by an examination of the order of the court requiring the bond, a copy of which appears in this brief at page 2. If it had been the intention of the court to reserve jurisdiction, appropriate words could have been found to express that intention, either in the final decree of September 23, 1915, or in the order allowing the appeal and requiring the supersedeas bond. Such words, however, are lacking, in each order. The bond, according to the order, must be "conditioned according to law." When the bond was filed it exceeded the requirements of the order, and provided that the principal and surety would stand good for amounts due to "the several parties lawfully entitled thereto."

It is therefore contended by your petitioner, with deference that the bond cannot, by any construction, be held to enlarge the court's order, and that inasmuch as a reservation of jurisdiction was not made by the order, it could not be made by a subsequent bond which contained obligations in excess of any requirement by the court.

In any event, if it should be held that the bond in some manner operates to reserve jurisdiction there still remains the fact that whatever the trial court might have desired to do the mandate of the appellate court gave no permission nor lawful jurisdiction to carry on "further proceedings". That such permission from the appellate court is necessary before jurisdiction is reinvested in the trial court has been heretofore discussed.

Respectfully submitted,

ROBERT A. BROWN, of St. Joseph, Mo.
MAXWELL V. BEGHTOL, of Lincoln, Neb.
Attorneys for Petitioner.

CHARLES A. FRUEAUFF,
Of Counsel,
New York City.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. , Original.

Ex PARTE IN THE MATTER OF LINCOLN GAS & ELECTRIC LIGHT COMPANY, PETITIONER.

RETURN TO APPLICATION FOR WRIT OF MANDAMUS.

To the Honorable Edward Douglass White, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

By way of return the respondent admits:

1. That the Lincoln Gas & Electric Light Company is a corporation organized and existing under the laws of the State of Nebraska, engaged in the business of manufacturing and distributing gas within the city of Lincoln, Nebraska; that he is a Judge of the United States District Court for the District of Iowa, Southern Division, and that by special assignment he sat as a Judge of the United States District Court for the District of Nebraska, Lincoln Division, at the times hereinafter set forth; that on the 27th day of December,

1906, an action was instituted in the Circuit Court of the United States for the District of Nebraska, Lincoln Division, (now the District Court of the United States for the District of Nebraska, Lincoln Division), wherein the Lincoln Gas & Electric Light Company, a corporation, is plaintiff and the City of Lincoln, et al., are defendants, as set forth in paragraph 2 of the Application for Writ of Mandamus; admits that the books of the petitioner show accounts between the petitioner and its customers between 1906 and 1920 aggregating 25,000 in number.

By way of further return the respondent alleges:

That on the 23rd day of September, 1915, a decree was entered by the Honorable Page Morris, District Judge of the United States District Court of the District of Minnesota, sitting as a Judge of the District Court of Nebraska, Lincoln Division, said decree being in the following form, to-wit:

DECREE.

"This cause came on to be heard on the 16th day of June, 1915, upon the report of Honorable John J. Sullivan, Special Master, filed herein on the 8th day of September, 1914, and the exceptions of the respective parties to said report and was argued by counsel, and taken under advisement by the court.

And now, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz:

That the report of said Special Master be, and the same is hereby confirmed;

That the bill of complaint herein, so far as the same relates to the ordinance of the city of Lincoln establishing a rate of charges for gas in said city be, and the same is, hereby dismissed, and the restraining order heretofore granted against the enforcement of said ordinance is hereby dissolved;

That the sum of thirty-five hundred dollars ($3,500.00) be, and the same is hereby, fixed and allowed as the compensation of said Special Master for his services and expenses, to be taxed as part of the costs of this action.

That the plaintiff pay the costs of this action.

By the Court. PAGE MORRIS,
Judge."

2. That upon such decree having been entered, the plaintiff in said proceedings, Lincoln Gas & Electric Light Company, made application that an appeal be allowed, whereupon an order was entered in said cause as follows:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.

LINCOLN GAS & ELECTRIC LIGHT COMPANY, *a Corporation, Plaintiff,*
vs.
THE CITY OF LINCOLN, *et al., Defendants.*

ORDER.

This cause having come on for hearing before me, one of the Judges of the District Court of the United States for the District of Minnesota,

sitting in this case by special assignment at Minneapolis, Minnesota, within said district, on the plaintiff's petition for the allowance of an appeal:

It is hereby ordered that the petition of the plaintiff be granted and the appeal therein prayed be allowed and that a duly authenticated transcript of the record proceedings and papers upon which said decree is based be sent to the Supreme Court of the United States.

It is further ordered that the injunction in this cause be restored and held in effect during the pendency of this appeal upon the plaintiff filing bond duly approved in the sum of Five Hundred Seventy-five Thousand ($575,000.00) Dollars conditioned as required by law and that the same act as a supersedeas and also to keep said injunction in effect and as a bond for costs and damages on appeal.

Dated November 22nd, 1915.

PAGE MORRIS,
Judge.

Filed in Lincoln Division Nov. 22nd, 1915.
R. C. HOYT, *Clerk.*
By J. H. MCCLAY, *Deputy.*

3. That thereupon a bond in the sum of $575,000.00 was tendered to the said Honorable Page Morris, District Judge as aforesaid, for his approval; said bond and the approval thereof is in the following form, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.

LINCOLN GAS & ELECTRIC LIGHT COMPANY, *a Corporation, Complainant,*

vs.

THE CITY OF LINCOLN, NEBRASKA, *et al., Defendants.*

APPEAL BOND.

Know All Men by These Presents: That the Lincoln Gas & Electric Light Company, a corporation, under the laws of the State of Nebraska, the complainant herein, as principal, and National Surety Company, a corporation, under the laws of the State of New York, as surety, are held and firmly bound unto the Clerk of the District Court of the United States, for the District of Nebraska, in the penal sum of Five Hundred and Seventy-five Thousand Dollars ($575,000.00) lawful money of the United States, to be paid to the said Clerk, and his successors in office, for the benefit of all gas consumers, who have been patrons of, and who have purchased gas from the said complainant, during the pendency of the above entitled action, from the commencement thereof, and for all gas consumers who shall purchase gas of the said complainant, or its successors hereafter, at any time before the final determination of said suit, and for the benefit of all whom it may concern, including the defendants herein, for which payment well and truly to be made the said principal and surety hereby bind themselves, their

successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and duly signed and executed by us, this 19th day of November, A. D. 1915.

Whereas, by virtue of an order and decree entered herein on the 23rd day of September, 1915, the temporary injunction heretofore granted in said cause, restraining the defendants from putting into effect and enforcing an ordinance known as Ordinance Number 432 of the City of Lincoln, Nebraska, regulating the price of manufactured gas and fixing the price for all manufactured gas sold within the city, at one dollar ($1.00) per one thousand cubic feet thereof, and providing that any Gas Company may add a penalty of not more than ten cents per one thousand cubic feet of gas sold, for non-payment after six days from the date such Gas Company has furnished a bill or statement to any consumer, and providing for a minimum monthly charge of twenty-five cents for a single gas service, was by said Court dissolved; and

Whereas, the above named Lincoln Gas & Electric Light Company has obtained an appeal to the Supreme Court of the United States, to reverse the judgment of said District Court, in said cause;

Now, therefore, the condition of this obligation is such that if the said Lincoln Gas & Electric Light Company shall prosecute its appeal to effect, or failing to make its appeal good, if it shall answer all costs and damages and refund for all overcharges, collected from gas consumers, above the price fixed by said Ordinance, and shall pay to the Clerk of this Court, or his successor in office, for the benefit of all whom it

may concern, and in particular for the benefit of all gas consumers entitled to refunds, all overcharges collected from such gas consumers since the granting of the original injunction in this suit, above the price for gas fixed by said Ordinance, together with interest thereon, when the several parties lawfully entitled thereto and the amount of the refund due each as aforesaid shall have been ascertained in this action in such manner as the Court shall direct, and when so ascertained, the determination to be binding upon all parties to this bond, then and when all the conditions of this bond shall have been complied with, this obligation shall be void, otherwise to be and remain in full force and effect.

LINCOLN GAS & ELECTRIC LIGHT COMPANY,
By FRANK W. FRUEAUFF,
President.

Attest:
E. E. McWHINNEY,
Asst. Secretary.

(Corporate Seal)

NATIONAL SURETY COMPANY,
By W. S. McCURDY,
Its Attorney-in-Fact.

(Seal)
W. D. TOOLE,
As to Surety.

STATE OF NEW YORK,
County of New York, ss.

On the 19th day of November in the year one thousand nine hundred and fifteen, before me personally came Frank W. Frueauff, to me known, who, being by me duly sworn, did depose and say that he resides in New York City, New

York; that he is President of the Lincoln Gas & Electric Light Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

HARRIET C. THIRKIELD,
(Notarial Seal) *Notary Public.*
New York, County No. 97.
New York Register No. 7053.

STATE OF MINNESOTA,

County of Ramsey, ss.

On this 19th day of November, A. D. 1915, before me appeared W. S. McCurdy, to me personally known, who being by me duly sworn, did say that he is the attorney-in-fact of the National Surety Company, a corporation described in and who executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation; and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said W. S. McCurdy, acknowledged said instrument to be the free act and deed of said corporation.

E. M. CEDARLEAF,
(Notarial Seal) *Notary Public.*
Ramsey County, Minnesota.
My commission expires June 2nd, 1920.

The above and foregoing bond approved this 22nd day of November, 1915.

PAGE MORRIS,
Judge.

4. An appeal of said cause having been perfected, was presented to this Honorable Court and the decree of the Honorable Page Morris therein affirmed and the ordinance assailed by the proceedings sustained. The decision of this Court was rendered at the October term, 1918, to-wit: June 2nd, 1919, and is reported in 250 U. S. 256. Thereupon a mandate was issued by this Court to the District Court of the United States for the District of Nebraska, Lincoln, Division, in manner and form following, to-wit:

"MANDATE.

"To the Honorable Judge of the District Court of the U. S. for the District of Nebraska, Greeting:

"Whereas lately in the District Court of the U. S. for the District of Nebraska, before you or some of you, in a cause between the Lincoln Gas & Electric Light Company, complainant, and the City of Lincoln, *et al.*, defendants, wherein the decree of the said District Court entered in said cause on the 23rd day of September, A. D. 1915, is in the following words, viz:

"This cause came on to be heard on the 16th day of June, 1915, upon the report of Hon. John J. Sullivan, Special Master, filed herein on the 8th day of September, 1914, and the exceptions of the respective parties to said report and was argued by counsel, and taken under advisement by the court.

"And now, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz:

"That the report of said Special Master be, and the same is, hereby confirmed;

"That the bill of complaint herein, so far as the same relates to the ordinance of the city of Lincoln, establishing a rate of charges for gas in said city, be, and the same is hereby, dismissed, and the restraining order heretofore granted against the enforcement of said ordinance is hereby dissolved;

"That the sum of thirty-five hundred dollars ($3,500.00) be, and the same is hereby, fixed and allowed as the compensation of said Special Master for his services and expenses, to be taxed as part of the costs of this action.

"That the plaintiff pay the costs of this action.

"By the Court: PAGE MORRIS,
Judge.

"And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and eighteen, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel.

"Consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said District Court in this cause be and the same is hereby modified as indicated in the opinion of this court, and as so modified be, and the same is hereby, affirmed with costs; and that the said defendants, the City of Lincoln, *et al.*, recover against the said complainant twenty dollars for their costs herein expended and have execution therefor.

June 2, 1919.

"You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice, and the

laws of the United States, ought to be had the said appeal notwithstanding.

"Witness the Honorable Edward D. White, Chief Justice of the United States, the twentieth day of December, in the year of our Lord one thousand nine hundred and nineteen.

"JAMES D. MAHER,
"Clerk of the Supreme Court of the United States."

5. Thereupon the plaintiff in said action, Lincoln Gas & Electric Light Company, moved for judgment on the Mandate and respondent herein, on January 6, 1920, sitting as a Judge of the United States District Court for the District of Nebraska, Lincoln Division, entered the following order in said action, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES, LINCOLN DIVISION.
No. 10A.

LINCOLN GAS & ELECTRIC LIGHT COMPANY, *Plaintiff*,
vs.
CITY OF LINCOLN, *et al.*, *Defendants*.

ORDER

Filed January 6, 1920.

"This cause came on for hearing upon motion for judgment on the Mandate of the Supreme Court of the United States herein, dated December 20, 1919, and filed in this Court December 24, 1919; upon due consideration whereof it is ordered, adjudged, and decreed:

"1. That the decree of September 23, 1915,

be, and the same hereby is, modified by adding thereto the following:

"The Court further finds that the ordinance of the city of Lincoln, approved December 10, 1906, levying an occupation tax against the complainant, violates the constitution of the State of Nebraska, and is for that reason illegal and void and that the enforcement of the same as to complainant should be and is hereby perpetually enjoined.

"2. That the decree of September 23, 1915, be further modified by adding after the words 'is hereby dissolved' the following 'without prejudice to the commencement of a new action to restrain the enforcement of said ordinance as provided in the opinion of the Supreme Court of the United States herein.'

"MARTIN J. WADE"

January 6, 1920.

6. On the same date, to-wit: January 6, 1920, there was presented the motion of the defendant, the City of Lincoln, theretofore filed, for restitution under the bond, which motion was as follows:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.

LINCOLN GAS & ELECTRIC LIGHT COMPANY, *a Corporation, Complainant,*

vs.

THE CITY OF LINCOLN, NEBRASKA, *et al., Defendants.*

MOTION.

Comes now The City of Lincoln, and respectfully shows to the Court that on the 22nd day of November, 1915, a bond was approved in this action, copy of which is hereto attached, marked Exhibit "A" and made a part hereof.

The said The City of Lincoln further shows that final judgment has been entered herein sustaining the validity of the ordinance of The City of Lincoln attacked in these proceedings and that by virtue of said judgment and the bond aforesaid, the complainant as principal and National Surety Company, a corporation, under the laws of the State of New York, as surety, are obligated for the payment of all overcharges collected from gas consumers above the price fixed by said ordinance and are further ob gated to pay to the Clerk of this Court, for the benefit of all whom it may concern, and particularly for the benefit of all gas consumers entitled to refunds on overcharges collected from such gas consumers since the granting of the original injunction in this suit, above the price for gas fixed by said ordinance, which said price was and is One ($1.00) Dollar per one thousand (1,000) cubic feet thereof, together with interest on such overcharges so collected; that the said complainant and the said surety are obligated to pay said sum to the Clerk of this Court when the several parties lawfully entitled to such refunds and interest and the amounts thereof shall have been ascertained in this action in such manner as the court shall direct.

The City of Lincoln therefore moves the Court for an order directing the Lincoln Gas & Electric Light Company to file herein an itemized

list of the consumers of gas from the time of the original restraining order issued herein to this date during the periods that the said Lincoln Gas & Electric Light Company have charged in excess of the rates prescribed by the ordinance so enjoined. That the Lincoln Gas & Electric Light Company be further required to itemize the amounts of gas sold, the overcharges collected, the dates thereof and a detailed computation of interest as to each such item from the date the same is collected, and pay said principal and interest to the Clerk of this Court as in said bond provided.

The City of Lincoln further moves the Court that a Master be appointed to audit said accounts and make distribution of the overcharges collected with interest thereon to the persons entitled thereto.

The City of Lincoln further moves the Court that the Lincoln Gas & Electric Light Company be directed to file an itemized list of any partial payments of said rebates made by the said company to any gas consumers, showing the amounts paid and the date when paid and that the Master be directed to pay to any such consumers the balance found due them, whether on principal or by virtue of interest properly due said consumers.

The City of Lincoln further moves that in the event the Lincoln Gas & Electric Light Company shall not furnish the information hereinbefore specified within a reasonable time, that the said Lincoln Gas & Electric Light Company and The National Surety Company be ordered and directed to pay to the Clerk of this Court the gross amount represented by the difference between the price fixed by the ordinance en-

joined and the amounts charged and collected by the Lincoln Gas & Electric Light Company for all gas sold from month to month with interest on such amounts computed by the month and that the Master be then directed to ascertain the persons entitled to refunds and interest and make distribution thereof.

CITY OF *LINCOLN*,
By C. *PETRUS* PETERSON,
Attorney.

That Exhibit "A" attached to said motion is the form of the bond hereinbefore set forth under paragraph 3 of the return.

7. Said motion, together with the objections made thereto, having been argued and submitted, the respondent, in the capacity aforesaid, on the same day made the following findings and filed and entered the following memorandum and judgment in said Court in said action, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.

LINCOLN GAS & ELECTRIC LIGHT COMPANY,
Plaintiff,
vs.
THE CITY OF LINCOLN, *Defendant.*

ORDER.

The ordinance in this case fixing a rate on gas was passed by the proper tribunal in 1906. On the claim that this ordinance was confiscatory

the suit was commenced, as I understand, in 1907, and has continued since that time until the final disposition of it in the Supreme Court under date of June 2, 1919. In the interval there was filed in this case three separate bonds,—one for three thousand dollars, one for one hundred and fifty thousand, and one for three hundred thousand,—all preceding the final hearing before Judge Morris in 1915. September 23, 1915, Judge Morris held that this ordinance was valid and dissolved the injunction and restraining order which then left, of course, a liability upon one or more of the bonds filed before that day. That was the situation of this case after the decree of September 23, 1915.

The plaintiff, however, desiring to have the finding of Judge Morris reviewed by the Supreme Court of the United States, filed its application before Judge Morris, November 22, 1915, asking the right of appeal, and asking the Court to fix the conditions of the appeal, and asking that "a proper order be made continuing in force the injunction in this cause during the pendency of the appeal and fixing a bond therefor". Thereupon Judge Morris made the order allowing an appeal to the Supreme Court of the United States and fixing the conditions upon which such an appeal might be had and restoring upon the application of the plaintiff, the injunction which had been dissolved by the decree of September 23, 1915, upon certain conditions, one of which—in fact, the principal one of which was the filing of a bond of five hundred and seventy-five thousand dollars "conditioned as required by law and that the same act as a supersedeas and also to keep such in-

junction in effect as a bond for costs and damages on appeal."

Thereupon the bond was filed and the injunction was restored. This was the expression of extraordinary power of court of equity. In fact all of these injunctions in rates cases under the provisions of which a patron using a commodity of a public utility is compelled to pay more than the rate fixed by the legal tribunal is an exercise of extraordinary power and there is only one way that the exercise of this extraordinary power can be justified either in morals or under principles of public policy, and that is by fixing conditions by bond or by deposit of money which will insure to the parties paying the increased rate a return of their money. But a mere return of his money does not do him justice if that money has been taken and received in excess of the legal rate and this is true no matter how strong the good faith of the corporation may be, and of course it is apparent that the corporation acts in these matters in good faith because there would be no object in acting any other way inasmuch as they must furnish the security for the performance of these conditions.

Now in view of these considerations Judge Morris' order not being specific, I assume that Judge Morris intended to do that which should have been done, which I think every court requires to be done in these times at least,—the repayment of the overcharge with a legal rate of interest attached. Of course in some of these cases the utility company not desiring to pay interest makes a deposit of money in a bank or with some other custodian approved by the court, but when it elects to file a bond and the

bond is accepted, the money received is its money. It has full use of that money except insofar, if at all, as by provided arrangement the money may be under supervision of sureties. So that while Judge Morris' order was general as part of the act of allowing the appeal, the plaintiff appeared and itself filed a bond which was approved by Judge Morris, containing this provision: "Now, therefore, the condition of this obligation is such that if the said Lincoln Gas & Electric Light Company shall prosecute its appeal to effect, or failing to make its appeal good, if it shall answer all costs and damages and refund for all overcharges, collected from gas consumers, above the price fixed by said ordinance, and shall pay to the Clerk of this Court, or his successor in office, for the benefit of all gas consumers entitled to refunds, all overcharges collected from such gas consumers since the granting of the original injunction in this suit, above the price for gas fixed by said ordinance, together with interest thereon, when the several parties lawfully entitled thereto and the amount of the refund due each as aforesaid shall have been ascertained in this action in such manner as the Court shall direct, and when so ascertained, the determination to be binding upon all parties to this bond, then and when all the conditions of this bond shall have been complied with, this obligation shall be void, otherwise to be and remain in full force and effect."

In its application, the plaintiff seeks the right of appeal and seeks the reinstatement of the injunction. It had no right to appeal except on the conditions named by the Court. The Court named the conditions and those condi-

tions were accepted by the plaintiff. It filed its bond and such bond was approved by the Judge who tried the case and to whom application for appeal was made.

Now, courts of equity don't pay much attention to form. They look for the substance and I hold that the condition of this bond under all the circumstances, is just as effective as if it were included in the order filed by Judge Morris. This is especially true in view of the fact that after the filing of this bond with these conditions, application was made by the plaintiff for a release of the three hundred thousand dollar bond then in force, which application was granted by the Court.

In this bond there are two conditions which arise upon this application,—one with reference to the payment of interest and one with reference to the continued jurisdiction of this Court. Holding as I have as aforesaid, that the condition of this bond is just as effective as if it were contained in the order, and being in effect a construction of the order by the Court that made it, which construction was accepted by the plaintiff, the repayment of overcharges must be made with interest from the time of the receipt of the money.

As to the jurisdiction of the Court and the control of the refunding processes, a court of equity once acquiring jurisdiction holds jurisdiction until it has done justice to all the parties upon questions which are presented to the Court in the case. It would be a grave injustice and be contrary to public policy in cases of this kind to require that consumers, after litigation is ended under a bond of this kind, should be compelled to go into some other court to find

relief in case the parties did not agree. It would mean a possible multiplicity of suits in a court not possibly familiar with the proceedings and in this case as in all other cases of this character, I hold that the case is not finished until distribution has been made. Especially is this true in view of the expressed condition of the bond that "the refund due each as aforesaid shall have been ascertained in this action in such manner as the Court shall direct." As with the interest, this was a condition of the right of appeal—the condition upon which appeal was had and under which the plaintiff was authorized to receive this money—a condition furthermore upon which other security was released.

Under all the facts, the Court holds (1) that the plaintiff must pay to the consumer not only the amount of the overcharge, but legal interest thereon from the date of the receipt of each amount and (2) that this Court has jurisdiction to determine the manner in which and the conditions under which such refund shall be made. To all of which the plaintiff excepts.

Dated:

_____

Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA,
LINCOLN DIVISION.

LINCOLN GAS & ELECTRIC LIGHT COMPANY,
Plaintiff,
vs.
THE CITY OF LINCOLN, *et al., Defendants.*
No. 10A. Equity Docket.

MEMORAUDUM.

WADE, D. J.

With reference to the question presented by the motion of defendants and the objections thereto by the plaintiff as to the right of the plaintiff in making restitution to have deducted from the amounts paid by consumers in excess of the ordinance rate, such an amount as would make a reasonable rate during period involved, the Court holds:

(1) That rate fixing is purely legislative; that the Court has no power to fix a rate either for the future or for the past. The only possible way in which a court might have jurisdiction in making an accounting to require the consumer to pay a reasonable rate which might be more than the ordinance rate which had been enjoined, would be where that right was reserved to the court as a condition to the issuance of the injunction.

(2) In this case the bond specifically provides "that there shall be repaid all overcharges collected from such gas consumers in this suit granting of the original injunction in this suit above the price for gas fixed by said ordinance, together with interest thereon." While this Court retains jurisdiction to make restitution, it cannot take away from the consumers their legal right under this bond. The bond specifically gives them the right to recover overcharges, and the word "overcharge" is specifically construed to be the difference between the ordinance rate and the amount paid. Therefore, this Court in administering restitution must give recognition to the legal rights which the consumers would have in a direct action upon

the bond, and in a direct action upon the bond no one could question the right of the consumers to recover the exact amount paid over and above the ordinance rate.

(3) Furthermore, the use of gas is a voluntary matter. A person can use it or not and the determination of whether it shall be used naturally depends to some extent upon the rate. After the issuance of the injunction in this case, the consumers had the right to continue the use of gas or not. Those who continued the use of gas were justified in doing so under the specific provisions of the bond that in case the ordinance was sustained the difference between the ordinance rate and the amount paid would be repaid to them. To now change the conditions and repay to them only what the Court might determine was the difference between the amount paid and the amount which they should have paid in the absence of an ordinance would be retroactive, unjust and illegal.

So that the plaintiff will be required to repay the amounts collected from the consumers in excess of the $1.00 ordinance rate, together with interest as heretofore determined.

It is proper here to state that the purpose of a court in providing security for restitution and in retaining jurisdiction to make such restitution is to the end that every consumer shall receive the full amount of overpayments without any deductions or expense of collection. Consumers should understand that their rights will be carefully considered and determined by this Court and that except under extraordinary circumstances there is no occasion for employing attorneys to represent them in recovering the overcharges. The Court will also scrutinize any

claims of assignees of overcharges and will reserve the right to reject assignments when the facts will justify. The Court frowns upon any attempt upon the part of any person to purchase claims for speculative purposes, feeling that every consumer should realize that the courts will give him absolute protection and absolute remedy for every right he has. Therefore, in the decree I am making an order that the plaintiff shall not pay assignees of overcharges, but that the same shall be presented to the Court for examination and determination.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.

No. 10A. Equity Docket.

LINCOLN GAS & ELECTRIC LIGHT COMPANY, *Plaintiff*,

vs.

THE CITY OF LINCOLN, *et al.*, *Defendants*.

ORDER AND DECREE.

Now, to-wit: on this 6th day of January, 1920, upon the entry of decree upon the mandate of the Supreme Court of the United States herein, the defendants present their motion for an order retaining jurisdiction in this Court of this case for the purpose of making restitution of overcharges under the conditions of the bond filed herein. The plaintiff objects to such application, which objections are on file. The motion and objections thereto having been argued and submitted and the Court being now fully advised, finds that the objectoins to said motion

should be, and the same are, hereby overruled. The plaintiff excepts.

And now, therefore, it is ordered and adjudged that under the ge eral equity powers of the Court and under the expressed terms of the bond filed in this case, the Court has jurisdiction to make all orders and decrees found to be necessary in making refund and restitution to consumers of gas of all amounts collected over and above the legal rate pending the litigation herein, to which ruling the plaintiff excepts.

And thereupon the question is presented under said motion and the objections thereto, as to whether the consumers of gas are entitled to receive interest upon the amount of overcharges paid by them, and the Court being now fully advised, finds and it is adjudged that the consumers of gas shall be paid by the plaintiff the overcharges, together with the legal rate of interest thereon from the time such overcharges were paid to the date of payment, to which the plaintiff excepts.

And thereupon under said motion and objections, there is argued and presented the claim of the plaintiff that in making repayment and restitution, the plaintiff shall have the right to have determined what amount would in fact be a legal, just and non-confiscatory rate during the period when the overcharges were paid and that plaintiff shall have the right to have an accounting and adjustment and that the amount, if any, of overcharges to be repaid, shall be only the difference between the amount paid and the amount which the Court might determine would be a legal, just and non-confiscatory rate.

And now upon said question, the Court being

fully advised, finds that the plaintiff is not entitled to the relief asked, but that under the law and under the specific terms of the bond, the consumers are entitled to receive the difference between the ordinance rate and the amount actually paid without deduction, together with interest. To this ruling the plaintiff excepts.

And now with reference to repayment and restitution, it is ordered that this Court alone shall have jurisdiction to determine all matters between the consumers and the Lincoln Gas & Electric Light Company, and it is now ordered and adjudged that all persons, their agents, employees or assignees, shall be, and they are hereby restrained from proceeding in any other court except this Court, to enforce or have adjusted the matter of overcharges or the repayment thereof. And it is further ordered that the plaintiff shall not pay the claim of any person claiming to be be an assignee of any consumer until the same has been presented to this Court and fully considered and approved.

And now further with reference to restitution and repayment, it is ordered that the plaintiff shall proceed with all practical expedition to make repayment to all consumers as herein determined and in accordance with the findings of the Court herein. At the end of sixty days the plaintiff shall file report as to progress in repayment.

During said period of sixty days any person having any claim or controversy in settlement or disposition of, by agreement of the parties, may file the same with the Clerk of this Court and at the expiration of said sixty days, the Court will determine whether or not it is neces-

25

sary to appoint a master for the consideration of controverted questions.

The Court retains jurisdiction to make further orders herein at any time nad the case is continued for such further orders.

MARTIN J. WADE,
Judge.

8. On February 19, 1920, the plaintiff filed a petition in the District Court of the United States for the District of Nebraska, Lincoln Division, in said cause for an appeal from the decree entered on the 6th day of January, 1920, which appeal was by said Court, your respondent presiding, allowed and thereafter such actions and proceedings were had and done that said cause was, by appeal, lodged in this Court for review. (Term No. 810, October term, 1919.)

9. Thereupon the defendants moved this Honorable Court to dismiss said appeal for the following reasons:

"1st—Because, as appears from the record, the appeal is frivolous and is taken for delay only.

2nd.—Because the judgment or decree from which the said appeal purports to have been taken is not final, but interlocutory.

3rd.—For want of jurisdiction because the judgment or decree from which the said appeal purports to have been taken lacks finality."

And this Honorable Court, upon consideration thereof, dismissed said appeal, such action being reported in

253 U. S. 477, and issued its mandate to the District Court of the United States for the District of Nebraska, such mandate being in the following form, to-wit:

UNITED STATES OF AMERICA, ss.
THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To the Honorable the Judges of the District Court of the United States for the District of Nebraska. Greeting:

(Seal of U. S. Sureme Court)

Whereas, lately in the District Court of the United States for the District of Nebraska, before you, or some of you, in a cause between Lincoln Gas & Electric Light Company, complainant, and The City of Lincoln, et al., defendants, wherein the decree of the said District Court, entered in said cause on the 8th day of January, A. D. 1920, was in favor of the said defendants, The City of Lincoln, et al., and against the said complainant, as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and nineteen, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and on motion to dismiss which was argued by counsel:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that

this appeal be, and the same is hereby, dismissed for the want of jurisdiction.

June 7, 1920.

You, therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-first day of June, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court
of thte United States.

Filed in Lincoln Division June 25, 1920.
R. C. HOYT, *Clerk.*
By J. H. MCCLAY, *Deputy.*

10. Thereupon, on the 14th day of October, 1920, pursuant to said mandate, and for the purpose of rendering effective the orders and judgment theretofore entered for restitution under the bond and to enable the court to arrive at and enter a final judgment in said cause, further proceedings were had, and the following memorandum and order were entered, to-wit:

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF NEBRASKA,
LINCOLN DIVISION.
No. 10A.
LINCOLN GAS & ELECTRIC LIGHT COMPANY,
Plaintiff,
vs.
THE CITY OF LINCOLN, *et al.*, *Defendants.*

MEMORANDUM AND ORDER.

WADE, D. J.

There must be a Master appointed in this case. All parties agree that this is the only solution. Distribution of the refunds in this case would be a comparatively simple matter if the question of interest were not involved. The Gas & Electric Light Company contend that legally it is not liable for interest upon the excess charges. This matter was heard in January and the Court held that interest must be paid. An appeal was taken at once to the Supreme Court of the United States, in which the parties assumed that the question would be speedily determined. The Supreme Court, however, held that the order was not final and therefore that it could not entertain the appeal. I find that counsel upon both sides are willing to do everythnig possible to have this question finally determined within a short time.

There are some cases where there has been payment in which the parties contend that they are entitled to recover interest, while the Company contends that the matter is fully settled. These questions will have to be determined. It would be a simple matter to determine any one individual case, but where there are thousands of claims, it is very difficult.

I have suggested to counsel that the whole matter may be expedited by having a special report from the Master within a very short time, as to some one or more individual claims. Counsel may then file exceptions to the report and the matter can be heard by the Court and determined and an appeal may be taken at once, which I am sure will be advanced by the Ap-

pellate Court to a speedy hearing. Then, have a stipulation that the determination in such individual case shall govern in all like cases. While an agreement to this plan has not been perfected, I feel, from the attitude of counsel, that some such plan will be adopted.

I am advised that actions have been commenced in some cases, notwithstanding the order of the Court that all cases shall be heard and determined in this proceeding. The order was made with a view of saving the claimants from individual expense in the collection of their excess payments. It can readily be seen that a separate suit by each claimant would be impractical. I understand that the question of the right to maintain individual suit is now pending in the State District Court. Under all circumstances, the Court will make no further order in relation to these individual actions at this time, merely expressing the hope that claimants shall co-operate in having all matters adjusted through the Master which I am appointing.

Counsel for all parties will understand that it is the endeavor of the Court to have this matter closed within the shortest possible period, and I am sure that they will all co-operate to this end.

Claimants will understand that the Master will proceed to prepare a report to this Court as to the amount due to each individual user of gas, together with the interest thereon, fully computed. When his report is filed, each claimant will see just exactly the amount which the Master finds him entitled to receive. If any claimant thinks it is not correct, he shall have the right to file his objections here and they will

be heard, so that any possible errors may be corrected.

I am making an order that the Master file his report in four separate installments, so that any party may, as soon as a report is filed, includi g his claim, make examination and file his objections, if any, so that the matter may be more speedily disposed of.

Claims for interest upon accounts already paid will be deferred in final hearing and determination until after the claims upon which no payments have been made have been considered, and these will be i..cluded in a separate report of the Master.

ORDER.

And now on this 14th day of October, 1920, in the above case, it is

Ordered and Adjudged, That Ralph P. Wilson be, and he is hereby, appointed Special Master herein, with full power to make investigation and determine all matters in controversy and make a report to this Court.

He shall proceed forthwith to examine the books and accou ts of the Gas & Electric Light Company and he shall, from such books and accounts, prepare a report upon each individual account of a consumer of gas who has paid any amount in excess of the ordinance rates during the pendency of any restraini g order or injunction herein, showing the total amount paid, the amount due to the consumer for overcharges or charges in excess of the ordinance rate, as heretofore determined in this case, and interest upon such excess payme ts computed at the legal rate of seven per cent per annum.

The individual cases will be included in a report to this Court, but in order that the process of adjustment may be expedited, the Master will file a report as soon as he has determined approximately one-fourth of the claims. Three additional reports will be filed, each including approximately one-fourth of the claims. This will simplify examination of the accounts. It is ordered that the Master shall set forth the claims as nearly as practicable, in alphabetical order. As soon as the first report is filed, the Court will make further orders as to notices and time for filing objections and for further proceedings.

The four reports, aforesaid, will include the claims where nothing has been paid. An additional report will include the claims where payments, or partial payments, have been made, and, in order that such report may be made, it is now

Ordered and Adjudged, That all persons who have received payment or partial payment, and who still claim a balance on account of interest or for any other reason, shall file his claim with the master within sixty days from this date, such claim stating the amount received, and the amount still claimed to be due. It will not be necessary to compute the amount of interest in filing a claim. It will be sufficient to specify in the claim the amount received by the consumer and make a general claim for interest thereon, and the computation may be hereafter made in case the Court holds liability. The master will prepare a printed form for the use of claimants, who can fill in the amount paid and make a general claim for anything still claimed to be due, which the consumer can use in the filing of

claims. It will not be essential that such printed forms be used, but it will simplify the procedure if such claims are uniform. The master will fix a time for hearing before him of these claims, and parties will be notified and evidence will be taken and the master will make his findings of facts, and of law, and report the same to this Court.

The testimony upon such hearings shall be taken in shorthand and preserved, but to save expense, it is ordered that the master shall not have transcript made or report the evidence taken in any individual case, except upon further order herein.

The master will understand that in the preparation of report of claims, the computation shall be made for the different periods during which excess rates were paid, there being a portion of the period during which the Court is advised the ordinance rates only were charged. Parties will understand that the only claims necessary to be filed with the master are those in cases where partial payment has been made by the Gas and Electric Company and where interest is now claimed upon the amount so paid or where it is claimed that the amount so paid was not correct for the period covered by such payment. It may be that in many cases a party will have a right to a refund of excess charges for a period not covered by any payment by the Company. Such a claim will be reported by the Master without having any claim filed before him. The same party may have a claim for interest upon partial payment for which a claim must be filed.

Persons who have heretofore filed claims with the Clerk of this Court need not file another

claim for the same matter in controversy with the Master, it being hereby ordered that all claims filed with the Clerk of this Court shall be turned over to the Master, who shall proceed with them as herein directed, with reference to claims filed direct with him by the claimant. The Master shall have power to direct any claimant to make his claim more specific and as to all claims, shall have full jurisdiction to require issues to be made and to do all other things which will enable him to simplify the hearings as much as possible.

It will not be necessary for the Master to compute the interest upon these disputed claims where partial payment has been made until further order by the Court. It will be sufficient in reporting his conclusions of fact and law to state that he holds that the Company is not liable for interest, or that the Company is liable for interest, as he may find, leaving the computation for later order, in case it is held that there is liability therefor.

The Master may, at any time, ask for further directions in regard to the performance of his duties.

In computing interest upon all claims, in order that the same may be uniform, computation shall be made upon the respective payments to October 1, 1920. Computations for interest from that date until the time of payment may be made at the time of such payment.

There is a contention that repayment of overcharges is not required after a certain date in 1915. Therefore, it may be necessary for the Master to make separate computation of the claims accruing up to such date and the claims accruing after such date. Such date shall be

determined from the record and the claims of counsel filed herei , the purpose being to have the report of the Master in such form that the questions raised as to liability after such date may be presented and determined by the Court.

The Master is hereby authorized to employ accountants and other assistants; to employ a stenographer; to issue subpoenas for witnesses and for the production of books and papers, and he may compel the attendance of witnesses and production of books and papers by fine or commitment with the same power as would the Court if sitting in such hearing.

The Master will proceed with expedition, to the end that final disposition of this case may be made as soon as possible, employing as many accountants as can work to adva tage in the preparation of the accounts for reporting, as aforesaid.

Any money necessary to be advanced, shall be paid, half by each of the parties to this case, and the Master will have the power to make and impose orders for such payment.

_____,

Judge.

11. That if any error has been committed in the proceedings afo esaid, the petitioner has or will have an adequate remedy by appeal.

12. Respo dent denies each and every allegation in petitioner's application contained except such as are admitted herein.

Wherefore respondent having fully answered prays

that the application of petitioner be dismissed with costs.

Respectfully submitted,

.....

Respondent.

STATE OF.....

County of.....ss.

Martin J. Wade, being first duly sworn on his oath, states that he is the respondent mentioned in the foregoing return and that the allegations therein contained are true.

.....

Subscribed in my presence and sworn to before me this.....day of March, 1921.

.....

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. , Original.

EX PARTE IN THE MATTER OF LINCOLN GAS & ELECTRIC LIGHT COMPANY.

BRIEF ON BEHALF OF THE CITY OF LINCOLN, NEBRASKA.

STATEMENT.

The application of petitioner is based upon the contention that the District Court had no jurisdiction to order the petitioner to carry out the terms of the bond given as a supersedeas to the decree of the court pending appeal because jurisdiction was not reserved in the decree appealed from.

The appeal was allowed and the injunction continued in effect upon condition that petitioner give the bond now in controversy. By the terms of the bond itself it was provided that repayment of the overcharges with interest should be made "when the several parties lawfully entitled thereto and the amount of the refund due each as aforesaid shall have been *ascertained in this action in such manner as the court shall direct*, and when so ascertained, the determination to be binding upon all parties to this bond".

His Honor, Judge Wade, upon the question of jurisdiction, held:

> (1) That under the general powers of a court of equity restitution could be ordered.
>
> (2) That the conditions of the bond approved by Judge Morris were as much a part of the order allowing an appeal as if set out therein, and that the bond reciting the conditions that the overcharges should be determined in the same action and in such manner as the court shall direct specifically reserved jurisdiction.

I.

A court of equity has inherent power to order restitution.

Bank of United States v. *Bank of Washington*, 6 Pet. 8, 17.
Northwestern Fuel Co. v. *Brock*, 139 U. S. 216.
Arkadelphia Co. v. *St. Louis S. W. Ry. Co*, 249 U. S. 134.

II.

Procedure by motion in original case to obtain payment of overcharges proper.

Louisville v. *Cumberland T. & T. Co.*, 225 U. S. 430.
In re Louisville, 231 U. S. 639, 634.

This practice is upheld in cases where reversal is had of decrees enjoining rates. One series of cases, Arkansas Rate Case, serves to illustrate.

Allen v. *S. & L. I. M. & So. Ry. Co.*, 230 U. S. 553

In this case the decree of the Circuit Court was reversed and remanded with directions to dismiss "without prejudice". The mandate contained language similar to that of the mandate in the Lincoln Gas case commanding that "such execution and further proceedings be had in said cause in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding."

Upon the coming down of the mandate a Master was appointed to determine overcharges (211 Fed. 172). The Master filed reports and upon decision of the Court thereon an appeal was perfected in this Court. The decision of this Court is found in *Arkadelphia Company* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134. Upon the question of jurisdiction it is said in that case:

> "The present appeals relate to a decree made in a subordinate action ancillary to the main causes, in which, as has been stated, the federal

jurisdiction was invoked solely upon the ground that the cases arose under the Constitution of the United States. It has been held repeatedly that jurisdiction of subordinate actions is to be attributed to the jurisdiction upon which the main suit rested, and hence thta where jurisdiction of the main cause is predicated solely on diversity of citizenship and the decree therein is for this reason made final in the Circuit Court of Appeals, the judgments and decrees in the ancillary litigation also are final. *Rouse* v. *Letcher*, 156 U. S. 47; *Gregory* v. *Van Ee*, 160 U. S. 643; *Rouse* v. *Hornsby*, 161 U. S. 588; *Pope* v. *Louisville, Etc., Ry. Co.*, 173 U. S. 573, 577.

The proceeding out of which the decree now in question arose was not merely ancillary, but was in effect a part of the main causes, taken for the purpose of carrying into effect the decrees of this Court reversing the final decrees in the main causes and, at the same time, for the purpose of giving effect to a reservation of jurisdiction by the court below as contained in those final decrees. The supplementary decree that is now before us, since it simply brings to a conclusion those former suits pursuant to our decrees therein, must be treated as involving the construction and application of the Constitution of the United States and as being made in a case in which a state law was claimed to be in contravention of the Federal Constitution, within the meaning of 238, Judicial Code.

Therefore the motions to dismiss must be denied."

On the merits it was said:

"We deal first with so much of the over-

charges as accrued prior to the final decrees. In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McKnight*, 244 U. S. 368, 373, doubt was expressed whether, in view of the form of the mandate, there was any power in the District Court to determine the liability of the railway companies upon the bonds. But at that time our attention was not called to the fact that the mandates contained a provision authorizing further proceedings; a provision that removes all question of the power of the District Court. *In re Louisville*, 231 U. S. 639, 645; *Louisville* v. *Cumberland Telephone Co.*, 231 U. S. 652."

The only case casting any doubt on the jurisdiction of the lower court to enforce restitution is *St. Louis I. M. & So. Ry. Co.* v. *McKnight*, 244 U. S. 368, where it was said:

> "It may be doubted whether, in view of the mandate, there was any power in the District Court to order fererence to the Master to determine the liability on the bonds; *but on this question we are not required to express an opinion.*"

This reference is to the same mandate as that mentioned in the Arkadelphia Case (supra) where the element of doubt is specifically overcome by the emphatic language quoted.

The present case is on a stronger foundation than the cases cited. In the cases where this issue has been raised the lower court has enjoined the rate and the decree has been reversed on appeal. In this case the bond in question served but one purpose, namely, to permit the appeal prayed by the petitioner to be taken

with the restraining order which was dissolved by the decree restored during the appeal. The District Court found the ordinance valid and, on appeal, its finding was affirmed. To obtain its appeal and supersede the decree the bond was filed conditioned that in the event thet appellant failed to make its appeal good the overcharges should be *"ascertained in this action in such manner as the court shall direct."* The petitioner having enjoyed the privilege of keeping the rate enjoined pending the appeal under a bond so conditioned ought not to be heard to deny the terms of its own obligation.

Reference to a Master for the purpose of determining the amounts an unsuccessful litigant has in his possession by virtue of orders of the court in the progress of the litigation is approved in the Arkadelphia Case (supra) and by the authorities therein cited reaching back to the earliest decisions of this Court and to antecedent English law. The respondent as Judge of the District Court has ordered the petitioner to do nothing more than to redeem its own solemn obligation.

The bond in controversy is not conditioned for payment direct to consumers, but to the Clerk of the District Court, for the benefit of consumers. In order to make distribution the Court must be advised of the amount due each consumer. The situation presented is identical with one in which the overcharge is paid in to court when collected. Can it be doubted that the Court under such conditions has jurisdiction to appoint a Master to ascertain the amounts of individual claims and make distribution?

THE SECOND APPEAL.

The petitioner, when the first order was made on January 6, 1920, invoked as its remedy the right of appeal. The mandate, notwithstanding the same arguments were then presented as are now urged here as to the jurisdiction of the District Court, issued its mandate "that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had." In view of the fact that the petitioner here could not have the issue reviewed because the decree entered lacked finality, this mandate would seem to direct such steps as would lead to a final decree on the merits. Such a decree requires a determination of the actual amount due for overcharges, to ascertain which a Master was appointed with proper directions.

THE DECREE IS CONCLUSIVE OF THE PERIOD DOWN TO JANUARY 6, 1920.

The Supreme Court in confirming the decisions of this court (*Lincoln Gas & Electric Light Company* v. *Lincoln*, 39 Sup. Ct. 454) says: (Page 458.)

> "The decree dismissed the bill, however, so far as it related to the rate ordinance, without reservation or qualification. Perhaps it would go without saying, but in our opinion the decree ought to be modified so as to permit complainant to make another application to the courts for relief against the operation of the ordinance *hereafter*, it it can show, as a result of its practical test of the dollar rate since May 1, 1915, or

> upon evidence respecting values, costs of operation, and the current rates of return uon capital as they stand *at the time of bringing suit* and are likely to continue thereafter, that the rate ordinance is confiscatory in its effect under the new conditions."

It is particularly to be noticed that the Court specifically states that the question is as to operating results "as they stand at the time of bringing suit and are likely to continue thereafter."

This question was also decided in the Missouri Rate Case, 241 U. S. 533, where the Court disposes of a contention that the decree was conclusive only up to the time of taking testimony, as follows:

> "Again it is said, conceding that the limitation without prejudice when applied to a rate case under the authorities has the significance which we have affixed to it, that meaning should only prevent the reopening of the inquiry as to the period embraced by the testimony in the case and therefore should not be extended so as to prevent the reopening from the time at least of the close of the testimony. This, it is said, must be the case since there might well be a change in conditions between the time when the proof in a case was taken and the entry of the final decree. But this contention again disregards the doctrine which, as we have pointed out, the reservation in rate-making cases came to be applied. In other words, it treats the reservation without prejudice as looking backward and overthrowing that which was concluded by the decree instead of considering it in its true

light, that is, as looking forward to the future and providing for conditions which might then arise."

That this is the proper construction of the order of the Supreme Court is borne out by the following cases:

Knoxville v. *Knoxville Water Co.*, 212 U. S. 1.
Wilcox v. *Consolidated Gas Co.*, 212 U. S. 19.
Northern Pacific Ry. v. *North Dakota*, 216 U. S. 579.
Louisville v. *Cumberland Tel. & Tel. Co.*, 225 U. S. 430.
Missouri Rate Cases, 230 U. S. 474.
Des Moines Gas Co. v. *Des Moines*, 238 U. S. 153.
Missouri v. *C. B. & Q. R. R.*, 241 U. S. 533.
Arkadelphia Milling Co v. *St. Louis S. W. R. R. Co.*, 249 U. S. 134, 147. Read paragraph at top of page.

The contention that the petitioner should be permitted to litigate each claim for rebate is untenable. As was stated in *Missouri* v. *C. B. & Q. R. R.*, 241 U. S. 533, 542, "The right to restrain the whole power having been enjoyed for the purpose of the complaint as to confiscation which was made, the contrary cannot be asserted in order to escape the effect of the decree holding that such complaint was erroneously made."

DELAY.

This litigation has been pending for more than fourteen years. It is increasingly difficult for the large number of consumers to understand why the case can not be brought to a close. Since the case was determined on its merits by the trial court in 1915 thte petitioner has prosecuted its appeal on the main issue to thtis Court, twice asked for a bill of review in this Court, appealed from an interlocutory order relating to restitution and instituted this original action challenging all jurisdiction of the Court to order restitution in the manner provided in its bond. What further paths of litigation it may seek to follow it alone knows. All we can do is to request a decision rendering the final settlement certain at the earliest time possible.

Respectfully submitted,

C. PETRUS PETERSON,

Attorney for City of Lincoln.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 29, ORIGINAL.

EX PARTE IN THE MATTER OF LINCOLN GAS & ELECTRIC LIGHT COMPANY.

ARGUMENT.

MAY IT PLEASE THE COURT:

I should like to preface the argument with the statement that I do not expect to be able to state any more clearly nor any more conclusively the basis upon which the respondent placed the orders complained of than he himself stated them in the memoranda opinions filed in the lower court as a part of the proceedings.

It will be my purpose rather to seek to analyze the new propositions presented here in the form of argument to which the attention of the respondent was not challenged, at least not with the detail here presented.

As I understand the propositions advanced to support the petition, they are that:

1. The district court had *no* jurisdiction to order restitution, or,

2. If it had *any* jurisdiction it had no jurisdiction to order restitution for the period following the date of the decree September 23, 1915, or,

3. If it had jurisdiction covering the entire period it had no jurisdiction to exercise its jurisdiction *in the manner* it did, namely, to appoint a master to compute the overcharges and report the same to the court, thereby defeating what the company apparently regards as an inalienable right to have 25,000 controversies instead of one.

As to Jurisdiction.

From December 27, 1906, to January 6, 1920, a little over thirteen years, the City of Lincoln was restrained from enforcing a gas rate ordinance. The only two respites from that restraint were the days elapsing between the entry of decrees in the lower court and the issuance of a supersedeas order for appeal. In the last instance, this was a period of sixty days, and during that period the city had notice an appeal was to be taken. To say to the City of Lincoln that this case was concluded in September, 1915, when its hands were tied by an injunction up to January 6, 1920, may be a serious attempt at being philosophical, but to the consumers who have paid overcharges in reliance upon a bond, conditioned that in the event the decree of the lower court was affirmed the overcharges were to be determined in the same action and when determined paid into court for the use and benefit of the consumer, the statement has more the resemblance of sarcasm than philosophy.

This petition for a writ of mandamus is remarkable for what it omits as much as for what it contains.

It omits:

1. The order of Judge Morris dated November 22, 1915 (pages 3 and 4 of return).

2. The bond given in pursuance of the order.

These two items are the very foundation of the orders issued by Judge Wade, as announced from the bench and as later embodied in the memoranda opinions filed by him.

Judge Morris, in September, 1915, held the rate ordinance valid and dissolved the injunction. The company could lodge an appeal and present the record to this court for review without superseding the dissolution of the injunction or it could, as it did, petition the court to fix a supersedeas. Having elected to invoke the protection of an injunction pending the appeal, and having effectively restrained the legislative act, it seems incongruous, to say the least, to have the company now contend that the district court lost jurisdiction by the signing of the decree in September, 1915.

Counsel states (page 4, additional brief) that "the order requiring the bond as a condition for appeal does not refer to nor modify the final decree (of September 23, 1915) in any particular."

It may be that after so long a period of security under an injunction the company lost sight of the fact, but the issue for fourteen years has been whether the City of Lincoln should be permitted to enforce a rate ordinance. Judge Morris on September 23 dissolved the injunction and said "Yes," and on November 22 he reinstated the injunction and said "No." This slight modification apparently has been overlooked. To the "No" on November 22 there was, however, an "if" attached which could be satisfied only by a bond which his honor Judge Morris reserved the right to approve in the sum of $575,000.

The terms of this bond are not mentioned in the petition for a writ.

The bond contains at least five provisions which the respondent regards as of vital importance:

1. It is conditioned for payment to the clerk of the court and not for payment to individual consumers.

2. The parties entitled to refund and the amounts due each are, according to the bond, to be "ascertained IN THIS ACTION in such manner as to court shall direct" and "when so ascertained to be binding upon all parties to this bond."

3. Interest on overcharges collected is specifically provided for.

4. The bond covers payment to the clerk of court for the benefit of both (1) patrons who HAVE *purchased* and (2) those who SHALL *purchase* "hereafter" *"at any time before the final determination of said suit."*

5. It is not only an appeal bond but a bond for injunction pending appeal.

Petitioner predicates its argument against jurisdiction on a thesis that two elements must concur to vest the District Court with jurisdiction to enforce restitution under a bond.

1. Reservation of jurisdiction in the final decree, and

2. Permission in the mandate of this court for "further proceedings."

As to first:

No case is cited where the court upon dismissing a bill in equity, directed against a legislative rate, ever reserved jurisdiction to deal with "future contingencies." The order in such cases is that the bill be dismissed. Just how the court would go about to dismiss a bill for want of equity and at the same time reserve jurisdiction for future contingencies is difficult to apprehend. The rule established by this court is to order dismissal "without prejudice," but that order would not suffice to meet the requirements of "retained jurisdiction" any better than the one made. From which it would seem to follow that, if the contention here made by the petitioner is sound, the consumer, in a rate

case, is better served if the trial court finds adversely than if it finds favorably. If it holds against the rate and continues an injunction, it has retained jurisdiction to do equity when this court orders its decree reversed; while if it decides the issue correctly and, upon the petition of the utility, continues the injunction pending appeal, the affirmance by this court takes away the jurisdiction to do equity, even though the court takes an obligation from the utility to adjust the overcharges in the same action as a condition precedent to its order continuing the injunction.

The fact is that the cases cited are cases where there has been an adverse finding on the rate by the lower court and a reversal by this court. There being no bond covering the period of the appeal, resort in such cases must be had to the general principles of restitution. It is one thing to restore a bond which is cancelled by the trial court and invoke the principles of restitution to cover the period of the appeal; it is quite another to make effective a bond specifically given as a condition precedent to restoring a dissolved injunction pending the appeal. This court in the adjudicated cases has held jurisdiction to do the former. So far as we can find, The Lincoln Gas Company is the first to challenge jurisdiction to do the latter. It would seem clear that if a bondsman, who is released by the trial court, may become rebound by the reversal on appeal, a bondsman bound by the trial court as a condition precedent to an order of supersedeas ought not to be released by an affirmance.

> "The force and effect of a decree dismissing a bill and discharging an injunction is neither suspended nor annulled as a mere consequence of an appeal to this court even if a supersedeas is allowed."
>
> Merrimack River Savings Bank vs. City of Clay Center, 219 U. S., 527.

The trial court by virtue of its inherent equity power may, in its discretion and on terms as to security fixed by it, continue the injunction pending appeal. It was said by this court, in Merrimack Riv. S. Bank vs. Clay Center (*supra*): *"Plainly the effect of continuing the injunction operated to continue in the Circuit Court such jurisdiction over the subject-matter of the litigation and of the parties as to enable it to preserve the status quo pending the appeal."*

See also the memorandum opinion of Judge Wade particularly on pages 19 and 20 of the return.

In the instant case, therefore, not only was jurisdiction continued in the District Court, pending the appeal, but such jurisdiction was continued and exercised during the entire period upon the motion of the petitioner and for its benefit. It would be difficult to conceive a more emphatic reservation of jurisdiction during an appeal of a rate case than by restoring to the defeated litigant an injunction against the enforcement of a rate which the court has found valid.

As to the Second Contention Respecting Form of Mandate.

The argument is based upon the difference between the printed portions of two forms used by this court.

(1) A form of which the mandate accompanying the opinion in 230 U. S., 553, is typical, directing that—

> "such execution and further proceedings be had in said cause in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding."

and

(2) A form of which the mandate accompanying the opinion in the Lincoln Gas Case is typical, directing that—

"such execution and proceedings be had in said cause as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding."

It happens that one is a mandate upon reversal and the other a mandate upon affirmance. Neither is a limitation upon the district court. Either must be read in its context to make its meaning clear.

Counsel argue strenuously the significance of the omission of the word "further" from the mandate, but make no effort to apply the language found *in* the mandate. The argument proceeds upon the premise that the district court should take cognizance of what this court meant by omitting a word it might have used rather than of the language this court did use. If the word omitted had in fact been included it would represent the difference between "proceeding" and "proceeding further" which, when applied to a concrete state of facts, is a distinction without a difference. The real measure is in the later phrase, common to both, "as according to right and justice * * * ought to be had."

If upon the reversal of a decree, as in the Arkansas Rate Case, "according to right and justice and the laws of the United States" jurisdiction continues to effect restitution, an affirmance, as in the Lincoln Gas Case, most assuredly, according to right and justice and the same laws of the United States, supports the same jurisdiction for a like purpose.

The Second Appeal.

Not only does the mandate in the affirmance of the decree of the lower court authorize proceedings as according to right and justice ought to be had, but when the first

order was entered the petitioner instead of proceeding by petition for a writ sought an appeal. This appeal, on motion of the City of Lincoln, was dismissed as lacking finality. A second mandate issued directing again the district court that such proceedings be had in said cause as according to right and justice ought to be had, etc.

This can bear no interpretation other than to take steps to arrive at a final decree.

Having answered the argument on jurisdiction to order restitution for any period or in any manner this appeal might be rested there, since manifestly the mandate of this court has not limited the discretion of the district court as to procedure for restitution and if any error be committed the remedy is by appeal and not by mandamus.

It seems preferable, however, to meet the balance of the argument now so that, if possible, this litigation may be ended.

The Decree is Conclusive of the Period Down to January 6, 1920.

This court in its opinion in the Lincoln Gas Case (250 U. S., 256) used this language:

> "The decree dismissed the bill, however, so far as it related to the rate ordinance, without reservation or qualification. Perhaps it would go without saying, but in our opinion the decree ought to be modified so as to permit complainant to make another application to the courts for relief against the operation of the ordinance *hereafter*, if it can show, as a result of its practical test of the dollar rate since May 1, 1915, or upon evidence respecting values, costs of operation, and the current rates of return upon capital *as they stand at the time of bringing suit* and are likely to continue *thereafter*, that the rate ordinance is confiscatory in its effect under the new conditions."

This question was definitely decided in the Missouri Rate Case, 241 U. S., 533, and the opinion there announced reaffirmed a few weeks ago in Minneapolis, St. Paul, etc., Ry. Co. vs. Merrick Co. (No. 15, October Term, 1920, decided December 20, 1920).

REVIEW OF INTERVENING PERIOD WAS DENIED BY THIS COURT.

The respondent had before him on the question of the period 1915 to 1919 not only the bond conditioned for repayment of overcharges but also the fact that this court had declined to entertain a bill of review for the same period. This was a part of the mandate, and instead of being an inhibition against treating that period as settled was an expression of this court entirely in keeping with the course followed.

The decree entered January 6, 1920, pursuant to the mandate of this court held the ordinance valid, and is conclusive except for the modification directed by this court that it be without prejudice to another action.

The petitioner elected its procedure when it obtained a reinstatement of the injunction pending the appeal. If it had permitted the ordinance to become operative pending the appeal it might have been in position to litigate a separate issue upon a new petition filed, but under the proceedings taken it is estopped to assert a right to retain overcharges collected under a bond upon the terms of which their customers had a right to and did rely.

(See memorandum opinion of Judge Wade, page 21 of return.)

If in cases where there is a reversal, equity requires, as held by this court in the Arkadelphia Case (249 U. S., 134), that the principles of restitution be invoked to cover the period of the appeal in the absence of a bond, certainly

an equity court will not deny a recovery under a bond specifically covering that period.

THE CONTENTION FOR SEPARATE SETTLEMENTS.

The party against whom the issuance of the injunction was effective to render inoperative the legislation may also enforce the obligations owing from the wrongful suspension of the litigation (Missouri vs. C. B. & Q. R. R., 241 U. S., 533, 542). This is particularly true where, as in this case, the bond is conditioned to pay to the clerk of the court and not to the individual consumer.

Respectfully submitted,

C. PETRUS PETERSON.